Supreme Court, U.S.
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Case Number

In the Supreme Court of the United States

JAMES C. CURREY AND FLOWERDALE, L.L.C.
PETITIONERS

v.

CITY OF DALLAS
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

1. Whether, once a municipality commences legal action against a landowner alleging that the landowner violated an ordinance of the municipality, the ripeness principles applicable to regulatory takings claims may be applied to deprive the landowner of defenses and counterclaims to the municipality's pending action.

2. Whether de novo appellate review of the trial court's determination of ripeness enables the reviewing appellate court to flout the trial court's unchallenged findings of fact.

II

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

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James C. Currey ("Currey") and Flowerdale, L.L.C. ("Flowerdale") (collectively "Landowners") respectfully petition for a writ of certiorari to review the denial by the Texas Supreme Court of Landowners' petition for a review of the judgment and opinion ("the Court of Appeals' opinion") of the Court of Appeals for the Fifth District of Texas at Dallas ("the Court of Appeals").

OPINIONS BELOW

The Court of Appeals' opinion, which pursuant to Texas Rules of Appellate Procedure Rule 47.7 was not designated for publication, appears at Appendix ("Pet. App.") A to this petition. The order by which the Texas Supreme Court

denied Landowners' petition for a review of the Court of Appeals' opinion, appears at Pet. App. B.

JURISDICTION

The order of the Texas Supreme Court denying Landowners' petition for review of the Court of Appeals' opinion (Pet. App. B) was dated June 27, 2002. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is an inverse condemnation case. At issue is whether the ripeness principles, which this Court in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108 (1985) held applicable to regulatory takings claims, deprived Landowners of their defenses and counterclaims to the legal action commenced by respondent the City of Dallas, Texas ("the City"). Because the case involves judicial denial of Landowners' ability to assert defenses and counterclaims to the City's legal action which thereby perpetuate an unconstitutional taking, the case is one of first impression in this Court.

1. Factual Background

The undisputed evidence and the unchallenged findings of fact following the trial of the liability phase of this action (Pet. App. C, Findings 1 through 28) establish the follow-

ing: The subject property ("the property") is part of a larger tract of land which was wholly owned by Currey until May 3, 1995. Currey then conveyed the total tract to Flowerdale, an entity for which he acted as agent (Finding 5). The property is located in Dallas County, Texas, and was designated as flood plain ("FP") on the City's zoning maps and on the Flood Insurance Rate Map ("FIRM") of the Federal Emergency Management Agency ("FEMA") (Finding 6). The City placed and retained the FP designation on the property based upon FEMA's determination that the property was in the flood plain (Finding 7).

Effective November 8, 1976, the City adopted and disseminated official procedures ("the City's Procedures"), which were entitled "Procedures for Removing the 'FP' Prefix" (Pet. App. D) and provided in part:

> Zoning Map Update: In order for the flood plain 'FP' prefix to be removed from the official City Zoning Map, the applicant must receive a Letter of Map Amendment/Letter of Map Revision from the Federal Emergency Management Agency (FEMA). It is the applicant's responsibility for securing the LOMA/LOMR from FEMA. Once the City of Dallas receives official notification that a LOMA/LOMR will be issued for revision of the Flood Insurance Rate Map (FIRM), then the Department of Public Works & Transportation will notify Planning and Development *to revise the zoning maps by removing the 'FP' prefix* (emphasis supplied).

Currey, believing the property to have been improperly included in the flood plain, demanded in 1994 that the City discontinue the property's FP designation (Finding 8). The City did not respond to Curry's demand; instead, the City refused to remove the FP designation or to initiate studies or surveys to justify the property's FP designation despite court

orders issued in this cause of action directing the City to survey and stake any flood plain (Finding 9).

Thereafter, Currey applied to FEMA for removal of the property from the designated flood plain (Finding 10). FEMA, in response to Currey's application, requested, and Currey supplied, the necessary empirical evidence to establish under FEMA criteria that the property was not in the flood plain (Finding 11). FEMA then issued a letter of map amendment ("the LOMA") dated March 7, 1996, declaring that the property was not in the flood plain, and contemporaneously notified the City of the LOMA and directed the City to append the LOMA to the City's flood plain maps (Findings 12, 13). In response to FEMA's directive, the City intentionally failed and refused to remove the FP designation from the property and to append the LOMA to the City flood plain maps; instead the City surreptitiously and without notice to Currey questioned FEMA as to whether issuance of the LOMA was justified (Finding 14). In response, FEMA specifically informed the City by correspondence that the LOMA was justified based upon empirical evidence submitted by Currey (Finding 15). Until discovery in this case, the City concealed from Currey these communications between the City and FEMA (Finding 16). Despite FEMA's notification that the LOMA was valid, the City again intentionally refused to append the LOMA to the City's flood plain maps and to remove the FP from the property, and continued to disregard court orders directing the City to survey and stake the property (Finding 17). In 1997, after the City's persistent refusal to remove the property's FP designation, Landowners made reasonable efforts to obtain fill permits for the property, which permits were denied by the City (Finding 19).

2. Proceedings in the Trial Court

On August 1, 1994, the City commenced this action in the 192nd Judicial District Court of Dallas County, Texas, ("the

Trial Court") seeking injunctive relief and penalties based upon allegations that defendant Lamar Neeley ("Neeley") inter alia deposited trash and fill on the designated flood plain in violation of ordinances of the City (Pet. App. E). On August 9, 1994 the City filed in this action a second amended petition (Pet. App. F) substituting Currey for Neeley as defendant and seeking the same injunctive relief and penalties. Currey answered denying the propriety of the property's FP designation and counterclaimed ("the counterclaim") alleging, not that the City's flood plain ordinance was unconstitutional or that the proper application of the ordinance was a regulatory taking, but that the City, in violation of its own procedures, unlawfully deprived Currey of his rights under the United States Constitution and the Texas Constitution by flouting the LOMA (Pet. App. G). On October 3, 1997 the City filed another second amended petition (Pet. App. H) naming Neeley as intervenor and seeking the same injunctive relief and penalties. Flowerdale, having acquired title to the property from Currey, answered denying the City's allegations (Pet. App. I) and intervened as a party counterplaintiff on the counterclaim. The Trial Court struck the City's affirmative claims as a sanction ("the Trial Court's sanction") for the City's violations of the Trial Court's repeated orders to survey and stake the flood plain, bifurcated the counterclaim into a liability phase and a damages phase, and proceeded to nonjury trial of the liability phase of the counterclaim as required by Texas law. Following that nonjury trial, the Trial Court, in addition to findings set forth above, found that: (a) Currey "took all reasonable steps necessary to remove the City's FP...and thus exhausted his administrative remedies" (Finding 20); (b) the City's "decision to retain the FP...despite FEMA's determination and without further justification for its existence, was knowing, intentional and final" (Finding 21); (c) the City "has intentionally, unreasonably and arbitrarily interfered with the Landowner's right to use [the property],

and has intentionally, unreasonably and arbitrarily denied the Landowner all economically viable use of [the property]" (Finding 23); (d) the City "treated Landowner and his representatives differently from other landowners similarly situated without any reasonable basis for doing so" (Finding 24); and (e) the "City, by its aforementioned conduct, is deemed to have appropriated [the property] for its own use without compensation to the owners of [the property], effective March 7, 1996, so as to constitute a 'taking' of [the property] under Article I, Sec. 17 of the Texas Constitution and Article V of the Bill of Rights of the United States Constitution" (Finding 27). Following jury trial on the damages phase of the counterclaim, the jury rendered a verdict awarding Landowners the determined value of the property. The Trial Court entered judgment ("the judgment") (Pet. App. H) reciting the Trial Court's sanction and granting relief in accordance with the Trial Court's findings and the jury's verdict. The City perfected an appeal ("the City's appeal") from the judgment to the Court of Appeals for the Fifth District of Texas at Dallas, Texas, ("the Court of Appeals").

3. Proceedings in the Court of Appeals; the Court of Appeals' opinion

The City's original brief on appeal presented to the Court of Appeals five issues for its review, none of which challenged any of the Trial Court's findings of fact. After all appellate briefs were filed on the City's appeal, the City filed a motion ("the City's federal claims motion") seeking dismissal of "all Landowners' claims brought under the United States Constitution" on the ground that Landowners had not suffered a concrete injury...because they have yet to be denied just compensation under state law." (Pet. App. L)

The Court of Appeals' opinion (Pet. App. A) dismissed the Landowners' counterclaim for want of jurisdiction on the premise that it was not ripe (pp 5-11). Under the heading

"Ripeness—State Claims," the Court of Appeals stated that because ripeness is "a primary jurisdiction question," the Court of Appeals would "review the matter de novo." It then proceeded to render its ruling with no deference whatsoever to the Trial Court. In summary, the Court of Appeals (a) completely disregarded the Trial Court's unchallenged findings of fact, and adopted factual assertions advanced by the City on appeal which not only lacked support in the Trial Court's findings (e.g., "Here, the landowners made no earnest attempts to comply with the appropriate city ordinance" (pp. 6-9)) but also were directly contrary to the Trial Court's findings (e.g. "The landowners, however, never submitted a FP fill permit application with the director of public works" (p. 8)); (b) asserted that "to properly remove the FP designation, the City required that the landowners obtain a LOMA *and* (emphasis in the Court of Appeals' opinion) follow section 51-5.102 of the Dallas Development Code" (p. 7); and (c) concluded that (i) because "the landowners did not approach the level of exhaustion required to comply with section 51-5.102 to have the FP designation removed from his property, they did not give the City a meaningful opportunity to make a final decision on the matter" and (ii) without a "final decision...the landowners' 'taking' counterclaim never ripened." (p. 9). Under the heading "Ripeness—Federal Claims," the opinion (pp. 9-10) reasoned that Landowners had "not yet suffered a concrete injury under the Fifth Amendment of the United States Constitution because, as explained above, they have not yet been denied just compensation under Texas law" and granted the City's federal claims motion.

By order dated June 27, 2002, the Texas Supreme Court denied Landowners' petition to review the opinion (Pet. App. B). Landowners timely file this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. WHETHER PREVIOUSLY DETERMINED REGULATORY TAKING RIPENESS PRINCIPLES ARE LIKEWISE APPLICABLE TO A LANDOWNERS' DEFENSES AND COUNTERCLAIMS WHEN AN UNCONSTITUTIONAL TAKING OF THEIR PROPERTY HAS OCCURRED PREDICATED UPON TORTIOUS AND UNLAWFUL REFUSAL BY THE CITY TO ADHERE TO ITS ADOPTED PROCEDURES IS AN IMPORTANT ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

II. THE COURT OF APPEALS' DISREGARD OF THE TRIAL COURT'S UNCHALLENGED FINDINGS OF FACT WAS PREDICATED ON A MISAPPLICATION OF THE STANDARDS, ENUNCIATED BY FEDERAL COURTS AND ADOPTED BY THE TEXAS SUPREME COURT, FOR REVIEWING FINDINGS OF JURISDICTIONAL FACTS AND RESULTED IN THE DEPRIVATION OF LANDOWNERS' RIGHTS UNDER THE UNITED STATES CONSTITUTION, ALL OF WHICH INVOLVE ISSUES WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001) this Court held that a state's denial of an application to fill wetlands was ripe for review. Summarizing the ripeness holdings of *Williamson County* and other decisions, this Court stated that a "takings claim challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" because a "final

decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of all economically beneficial use of the property." This Court reasoned, however, that these principles were inapplicable "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened" 533 U.S. at 621, 121 S.Ct. at 2459. See also *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739, 117 S.Ct. 1659, 1667 (1997) ("Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County's* requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel"). Additionally, citing *City of Monterrey v. Del Monte Dunes at Monterrey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624 (1999), this Court in *Palazzolo* stated that governmental "authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision" *id.*

Del Monte Dunes involved an action in federal court challenging the constitutionality of a municipality's misapplication of its land use ordinances. In discussing the case's procedural history, this Court noted that the district court had dismissed the case "as unripe" but the Ninth Circuit reversed the dismissal at 920 F.2d 1496 (9th Cir. 1990) on the grounds that "to require additional proposals would implicate the concerns about repetitive and unfair procedures" which this Court had expressed in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n.7, 106 S.Ct. 2561 (1986) and that, therefore, the municipality's "decision was sufficiently final to render Del Monte Dunes' claim 'ripe for review'" 526 U.S. at 698, 119 S.Ct. at

1633. Then, affirming judgment on a jury verdict against the municipality, this Court held:

> ...to the extent Del Monte Dunes' challenge was premised on unreasonable governmental action, the theory argued and tried to the jury was that the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city. Del Monte Dunes' argument, in short, was *not that the city had followed its zoning ordinances and policies but rather that it had not done so. As is often true in '1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and if so, the extent of any resulting damages. These were questions for the jury.* (emphasis supplied).

526 U.S. at 721, 119 S.Ct. at 1644.

In this case, unlike *Williamson County*, Landowners neither challenged the application of any land-use regulations of the City nor contended that any regulation of the City "went too far." On the contrary, in this case the City had sued Landowners for filling the property which the City, acting at FEMA's direction, had designated FP. After fulfilling all of the requirements imposed by the City's Procedures and FEMA for removal of the FP from the property, the Landowners were seeking to exercise their rights to assert defenses and counterclaims against the City's cause of action for illegally filling in the flood plain by asserting their compliance with these procedures and FEMA's direct orders to the City. See *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320 n. 6 (4th Cir. 2001) ("'The state...by instituting suit submits its claim as a private litigant and subjects itself to all of the defenses available to such litigants.'..."). It certainly follows that once Landowners

met the City's procedural requisites for removal of the FP from the property, when Landowners were sued by the City based upon acts done within that FP, Landowners had the absolute right to raise the City's tortious conduct in improperly designating same as FP as a defense and a counterclaim.

In *Suitum* this Court stated that "because the Agency has no discretion over the right to use the land in question, no occasion exists for applying *Williamson County's* requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel." In this case, the permissible uses of the property by the City under its FP ordinance were known with certainty: When FEMA issued the LOMA and notified the City thereof, the City's Procedures obligated the City to remove the FP designation from the property; the City lacked discretion to do otherwise. Under *Del Monte Dunes*, by its failure to do so, (which is undisputed) the City tortiously and unlawfully exceeded the bounds of its authority by refusing to remove the FP from the property in violation of the City's Procedures. Under *Palazollo* and *Suitum*, Landowners' challenges to the conduct were then ripe.

The Court of Appeals' dismissal on ripeness grounds of the "State Claims" in the Landowners' counterclaim was predicated on the premise that to "properly remove the FP designation, the City required that Landowners obtain a LOMA *and*(emphasis in the opinion) follow section 51-5.102 of the Dallas Development Code." The City raised this issue at trial and it was rejected by the Trial Court. In clear and unequivocal language the City's Procedures stated, "Once the City...receives official notification" that a LOMA "will be issued" the City will "revise the zoning maps by removing the 'FP' prefix." Thus, the City's Procedures required for removal of the FP prefix only that Landowners receive a LOMA and that the City receive official notification of the issuance of the LOMA.

The evidence, and the Trial Court's unchallenged findings of fact, established that Currey obtained the LOMA from FEMA and that the City received from FEMA official notification of the issuance of the LOMA. Instead of complying with the LOMA, however, the City surreptitiously attempted to induce FEMA to rescind the LOMA and, when that effort failed, imposed on Landowners the fallacious additional requirement that Landowners "follow section 51-5.102 of the Dallas Development Code." Even if this was a valid requirement, the Landowner's met it. Somehow in its total disregard of the facts determined at trial, the Court of Appeals ignored the finding that the Landowners made reasonable efforts to obtain fill permit which were denied by the City. Failure to obtain a fill permit is the requirement of 51-5.102 of the Dallas Development Code which Landowners are held not to have met by the Court of Appeals, a finding wholly conflicting with the facts as determined by the Trial Court.

As the Trial Court appropriately found, (finding 21), the City made a "knowing, intentional and final" decision not to remove the FP from the property solely because of Landowners' alleged failure to fulfill that fallacious additional requirement. The Trial Court's unchallenged findings should have been conclusive. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, Inc.*, _____ U.S. _____, 122 S.Ct. 1465, 1468 (2002) (Recovery on a "bad faith theory or a theory that the state interests were insubstantial is *foreclosed by the District Court's unchallenged findings of fact*" (emphasis supplied)). However, after arrogating to itself the power to accord "no deference to the trial court's decision", the Court of Appeals flouted the Trial Court's unchallenged findings and unconscionably adopted the City's factual assertions which had no support in any of those unchallenged findings.

As authority for arrogating to itself the power to accord the Trial Court's unchallenged findings "no deference", the

Court of Appeals' opinion cited *Subaru of America, Inc. v. David McDavid Nissan, Inc.* 44 Tex. Sup. Ct. J. 779, 2001 WL 578337 (Tex. 2001) *rehearing granted. Subaru*, however, involved whether "an administrative agency has exclusive jurisdiction" which the Texas Supreme Court stated was a "*question of law* and our review is de novo" because when "conducting a de novo review, the reviewing court exercises its own judgment and redetermines each *legal issue*" (emphasis supplied). *Subaru*, therefore, was completely inapplicable to appellate review of the Trial Court's unchallenged findings of fact.

In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) the seminal Texas decision involving ripeness of actions involving land-use regulations, the Texas Supreme Court stated that Texas courts "should look to the experiences of the federal courts in determining the ripeness of constitutional challenges to land-use regulations," 964 S.W.2d at 928-29, and cited decisions of federal courts as the basis for its decision on the ripeness 964 S.W.2d at 928[1] Where the issue is non-compliance with an ordinance, *Del Monte Dunes* dictates that ripeness is a factual issue and as such was properly found by the Trial Court in its findings of fact. Indeed, citing *Suitum* the Texas Supreme Court in *Mayhew* aptly acknowledged that it may have been "compelled to reach that result, at least with respect to the *Mayhews*' federal claims" because while "state procedural law generally determines the manner in which a federal question is to be presented in state court, that is not the case if federal substantive law defines its own procedural matrix" 964 S.W.2d at 929 n. 1.

Federal courts have consistently held that a trial court's findings of fact applicable to issues of ripeness and jurisdiction have the same force and effect as findings of fact on all

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[1]It should be noted that *Mayhew* was determined prior to *Del Monte Dunes*.

other issues following a trial on the merits. *Coalition for Sustainable Resources, Inc. v. United States Foreign Service*, 259 F.3d 1244, 1249 (10th Cir. 2001) ("We review the district court's dismissal on ripeness grounds de novo and *its findings of jurisdictional fact for clear error*" (emphasis supplied)); *Ohio National Life Ins. Co., v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) ("Where a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, *a reviewing court must accept the district court's findings unless they are clearly erroneous*"(emphasis supplied)); *Winter v. California Medical Review, Inc.*, 900 F.2d 1322, 1324 (9th Cir. 1989) ("the existence of subject matter jurisdiction presents a question of law reviewed de novo by this court...*The district court's factual findings on jurisdictional issues must be accepted unless they are clearly erroneous*" (emphasis supplied)); *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (If a trial court's jurisdictional decision was predicated on the trial court's "determination of disputed factual issues, *we must then review those findings as we would any other district court resolution of factual disputes—we must accept the district court's findings unless they are 'clearly erroneous'*" (emphasis supplied)).

In this case, the Court of Appeals' utter disregard of the Trial Court's unchallenged findings contravened the federal standards which were adopted by the Texas Supreme Court and applicable to this case. As this Court stated in *Icicle Seafoods, Inc v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527 (1986), nowhere in the Court of Appeals' opinion did the Court of Appeals "ever mention any of the factual findings of [the Trial Court], much less discuss or analyze them" and because the Court of Appeals was required to review findings of fact under the clearly erroneous standard, "the Court of Appeals was mistaken to engage in such fact finding... it should not simply have made factual findings on its own..." 475 U.S. at 713-14, 106 S.Ct. at 1529-30; see

also *Pullman-Standard v. Swint*, 456 U.S. 273, 287-93, 102 S.Ct. 1781, 1790-92 (1982) (The clearly erroneous standard of review "does not make exceptions or purport to exclude certain categories of factual findings from the obligations of a court of appeals to accept a district court's findings unless clearly erroneous...[T]he Court of Appeals...failed to remand for further proceedings...Instead, the Court of Appeals made its own determination...Proceeding in this manner seems to us incredible...").

To be sure, as this Court noted in *Icicle Seafoods*, 475 U.S. at 712, 106 S.Ct. at 1529, under ordinary circumstances "state courts are not required to apply [the clearly erroneous standard of review]...to their own appellate system for reviewing factual determinations of trial courts." Nevertheless, the Texas Supreme Court's adoption, and acknowledgment of the applicability of, federal standards obligated the Court of Appeals to apply those standards correctly. The Court of Appeals' failure to do so deprived Landowners of the redress to which they were entitled for the violations of Landowners' rights under the United States Constitution established by the Trial Court's unchallenged findings of fact. Indeed, this Court's plurality in *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859 (1991), addressing the "standard of review of a state trial court's findings of fact made in connection with a federal constitutional claim" concluded that Awe decline to overturn the state trial court's finding...unless convinced that its determination was clearly erroneous" 500 U.S. at 366-69, 111 S.Ct. at 1870-71. Thus, the principles enunciated and applied in *Icicle Seafoods* and *Pullman Standard* were directly applicable to the Court of Appeals' utter and improper disregard of the Trial Court's unchallenged findings of fact.

In short, because Landowners fulfilled all of the City's requirements to obtain removal of the FP, the City lacked any discretion to do otherwise. Nevertheless, after its surreptitious and unsuccessful attempt to obtain rescission of

the LOMA the City imposed additional fallacious requirements of a fill permit in order to thwart the result of compliance with the LOMA. Yet when the Landowners made reasonable attempts to obtain same, the City denied them. A clearer case of the tortious and unlawful imposition of repetitive or unfair land-use procedures condemned by this Court in *MacDonald, Del Monte Dunes* and *Palazollo* is difficult to conceive. The City's blatant violation of the City's Procedures clearly effected an unconstitutional taking of the property by denial of all economically viable use thereof and appropriating the property for its use without compensation. The counterclaim by which Landowners sought redress for that taking was ripe for judicial review.

Under the heading "Ripeness—Federal Claims" the Court of Appeals' opinion (pp. 9-10) granted the City's federal claims motion, reasoning that Landowners had "not yet suffered a concrete injury under the Fifth Amendment of the United States Constitution because, as explained above, they have not yet been denied just compensation under Texas law." However, as explained above in this petition, the City's tortious, and unlawful conduct, together with the Court of Appeals failure to comply with federal principles which were adopted by the Texas Supreme Court, denied Landowners just compensation. Thus, as the Texas Supreme Court aptly stated in *Mayhew, supra*, 964 S.W.2d at 929 n. 2, the requirement that "before a regulatory takings claim can be maintained in *federal court*, a plaintiff must seek compensation through the procedures the state has provided for doing so...*does not apply in this case*" (emphasis supplied). Moreover, Landowners met the requirement for ripeness that "one seeking compensation must 'seek compensation through the procedures the State has provided for doing so'" because the Texas Supreme Court's refusal to review and set aside the Court of Appeals' dismissal of the Landowners' counterclaim "establishes that the inverse condemnation procedure is unavailable...'...The [counterclaim] is accord-

ingly ripe" for consideration by this Court. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 312 n. 6, 107 S.Ct. 2378, 2384 n.6 (1987).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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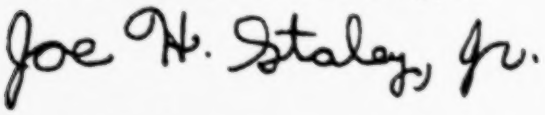

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ATTORNEY FOR PETITIONERS

DATED: SEPTEMBER 25, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition for review was forwarded to counsel for Respondent Ronald Stutes, Assistant City Attorney, City of Dallas, 1500 Marilla Street 7BN, Dallas, Texas 75201 on this 25th day of September, 2002 by certified United States mail, return receipt requested.

Joe H. Staley, Jr.

Joe H. Staley, Jr.

Appendix A

REVERSE and REMAND in part, REVERE and DISMISS in part; Opinion issued December 20, 2001.

In the Court of Appeals
Fifth District of Texas at Dallas

No. 05-00-01436-CV

CITY OF DALLAS
Appellant/Cross-Defendant

v.

JAMES C. CURREY AND FLOWERDALE, L.L.C.,
Appellees/Cross-Plaintiffs

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 94-07642-K

OPINION

Before Justices O'Neill, Farris,[2] and Rosenberg[3]
Opinion By Justice Farris

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[2] The Honorable David F. Farris, Former Justice, Second District Court of Appeals, Fort Worth, Texas, sitting by assignment.

[3] The Honorable Barbara Rosenberg, Former Justice Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

The City of Dallas appeals from the trial court's final judgment that dismissed with prejudice the City's claims against James C. Currey and Flowerdale, L.L.C. (collectively, the landowners) and granted the landowners' inverse condemnation counterclaim against the City. On appeal, the City raises five issues, two of which we find dispositive: (1) whether the trial court imposed impermissible "death penalty" sanctions against the City; and (2) whether the landowners' "taking" counterclaim was ripe.[4] By striking the City's pleadings without first testing the effectiveness of lesser sanctions, the trial court abused its discretion when it imposed "death penalty" sanctions against the City. Accordingly, we reverse that portion of the trial court's final judgment denying and dismissing with prejudice all of the City's claims against the landowners and remand for further proceedings consistent with this opinion. Furthermore, because the landowners did not approach the requisite level of exhaustion in seeking the City's final decision about removing the flood plain designation from his property, their "taking" counterclaim was not ripe. Accordingly, we reverse that portion of the final judgment granting the landowners' counterclaim and dismiss it for want of jurisdiction. We also grant the City's motion to dismiss the federal claims for lack of subject matter jurisdiction.

"Death Penalty" Sanctions

In August 1994, the City sued Currey for violating city ordinances concerning illegal dumping and asked for a temporary injunction. Current filed an answer and counterclaim, alleging the city ordinances effectuated a "taking." On August 23, 1994, the trial court entered an agreed

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[4]We need not address appellants' second, fourth, or fifth issues. *See* TEX. R. APP. P. 47.1.

injunction, noted Currey's agreement to stop depositing fill, ordered the City to conduct a survey of the land to determine upon which portion of that land could legally receive deposit fill, and demanded that Currey grant the surveyor access to his property. The record reflects several reasons why, in 1994 and 1995, the City failed to comply with the trial court's repeated orders to survey the subject property: (1) the parties decided there was no need to hire a surveyor because they were trying to reach a global settlement; (2) the parties could not agree upon a surveyor (Currey rejected the City's list of proposed surveyors); (3) the process of contracting with a surveyor took time; (4) Currey incorrectly believed the scope of the survey was a complete boundary survey, rather than a survey that would only delineate the flood plain line; and (5) according to the trial testimony of the surveyor, John Pibern, Currey called the police and threatened Piburn and his crew, demanding that they leave his property.

In January 1998, the landowners filed a motion to compel the survey. The trial court granted this motion and expanded the survey's scope, this time ordering that "pursuant to [the May 5, 1995 order,] the City of Dallas shall complete a boundary survey by metes and bounds of all the property" and place visible markings to designate the flood plain area. In its attempts to comply with the 1998 order to survey, the City again hired Piburn, this time expanding the scope of the survey to include a complete boundary by metes and bounds. Piburn testified that when his crew began to survey the property, Currey again confronted Piburn about being on his property.

On May 7, 1998, the landowners filed a motion for sanctions because the City had "thumbed its nose and refuse[d] to comply" with the trial court's orders demanding that the City survey the land. Because they asserted the

absent survey precluded them from conducting meaningful discovery and from preparing for trial, the landowners asked (1) that the City be prohibited from introducing any evidence that any of the subject property was ever in a flood plain; and (2) that the City's pleadings be struck, insofar as they alleged the landowners violated any laws governing activities concerning the flood plain. In June 1998, the trial court entered its order granting the landowners' requested relief.

Piburn completed the survey in late 1998 and early 1999.

In March 1999, the trial court granted the landowners' motion for partial summary judgment "after considering the pleadings [and] lack of proof raised opposing the motion" and dismissed all of the City's claims against the landowners with prejudice. In other words, the trial court granted the landowners' motion for partial summary judgment based on the consequences that stemmed from the trial court's order for sanctions. The trial court referenced both orders (the order granting partial summary judgment and the order granting sanctions) as the basis for its final judgment.

A trial court possesses all inherent powers necessary for the enforcement of its lawful orders. *Wal-Mart Stores, Inc. v. Butler,* 41 S.W.3d 816, 817 (Tex. App.-Dallas 2001, no pet.) (applying sanction test in discovery violation case, *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2nd 913 (Tex. 1991) (orig. proceeding), to sanction for violation of pretrial order). A trial court may impose appropriate sanctions for violations of pretrial orders; however, the sanctions must be just. *Id.* We review the trial court's imposition of sanctions under the abuse of discretion standard. *Id.* at 818. As outlined in *TransAmerican,* there are limitations on a trial court's power to impose sanctions. *Id.* at 817 (citing *TransAmerican,* 811 S.W.2nd at 917). First, there must be a direct relationship between the offensive

conduct and the sanction. *Id.* at 817-18. Second, the sanction must not be excessive, that is, the sanction should be no more severe than necessary to satisfy its legitimate purposes. *Id.* at 818.

A court's ability to impose a "death penalty" sanction is further limited by due process. *Id.* Sanctions that are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the rules. *Id.* Even then, lesser sanctions must first be tested to determine whether they are adequate to secure compliance, deterrence, and punishment of the offender. *Id.*

Here, the record indicates that the City attempted to settle the matter without having to hire a surveyor, it provided names of surveyors that Currey rejected, and it twice hired an agreed-upon surveyor to conduct court-ordered surveys (the first survey cost the City $6000; the second cost $18,000). The surveyor testified that Currey stopped the survey in 1995 with his threats and began to make similar threats in 1998. Considering the facts of this case, we cannot say the City engaged in flagrant bad faith or that its counsel displayed a callous disregard for the rules.

Moreover, by striking the City's pleadings and denying the City the opportunity to present any evidence that any portion of the subject property was ever in a flood plain, the trial court precluded the City from presenting its claims on the merits against the landowners. Thus, the trial court was first required to test lesser sanctions, such as imposing a fine or holding City officials in contempt. *See id.* Because the record does not show the trial court tested lesser sanctions, it abused its discretion in striking the City's pleadings.

Ripeness — State Claims

In the second dispositive issue, the City asserts the landowners' "taking" claim should have been dismissed as not ripe because, in their attempts to fill the flood plain area of the property, they did not approach the level of exhaustion required in seeking the City's final decision on the matter. Specifically, the City claims the landowners failed to request the removal of the flood plain (FP) designation, submit a fill permit for the FP area, or seek rezoning of the property to use it as he proposed. We agree.

Ripeness is a primary jurisdiction question, and as such, we review it de novo, with no deference to the trial court's decision. *See Subaru of Amer., Inc. v. David Mcdavid Nissan, Inc.*, 44 Tex. Sup. Ct. J. 779, 782-83, 2001 WL 578337, at *5 (May 31, 2001, rehearing granted).

As an initial matter, we disagree with the City's assertion that Currey's claims at the time he filed suit in 1994 were not ripe because Currey did not file his applications until 1997 and 1998.[5] The Texas Supreme Court recently held

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[5]We also disagree with the landowners' argument that the City's authorities upon which it relies are distinguishable from the present flood plain case because those cases were zoning cases. We see no meaningful distinction for purposes of this appeal; both types of cases involve claims challenging the application of land-use regulations. *See Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2458, (2001) (analyzing council's denial of landowner's application to fill eighteen acres of wetlands to construct beach club and quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), for its holding that " 'a taking claim challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' "); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928-29 (Tex. 1998) (looking to federal law for guidance in addressing ripeness of constitutional challenges to "land-use" regulations).

that a claim's lack of ripeness when suit is filed is not a jurisdictional infirmity requiring dismissal if the case matures during the pendency of the case. *See Perry v. Del Rio*, 44 Tex. Sup. Ct.J.1147, 1153, 1154, 2001 WL 1044910, at *5, *7 (Sept. 10, 2001) (indicating that ripeness should be determined at time of adjudication, based on all information available to court, including intervening events). Therefore, we must determine whether the case became ripe, considering all events that transpired during the pendency of the case and not just at the time Currey filed suit.

For a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998). Although a "final decision" usually requires both a rejected development plan and the denial of a variance from the controlling regulations, the Texas Supreme Court has recognized that in some cases "futile variance requests or reapplications are not required." *See id.* at 929, 931 (deciding that landowners' compliance attempts established finality requirement); *City of Houston v. Kolb*, 982 S.W.2d 949, 952 (Tex. App.-Houston [14th Dist.] 1999), (concluding that city's inability to authorize alterations to subject property established finality requirement).

Here, Currey, and later Flowerdale, owned 142 acres of land near Dallas, approximately ninety-five acres of which the Federal Emergency Management Agency (FEMA) had designated as FP area in its 1991 flood insurance rate map (FIRM). To remove the FP designation, Currey requested and received FEMA's Letter of Map Amendment (LOMA), which was dated March 7, 1996, the date that the trial court would later determine was the date of the "taking." With this LOMA in hand, Nealy, a third party who dumped fill on the land with Currey's permission, began filing applications

on the landowners' behalf with the City's Building Inspection Department so that fill could continue being deposited on the land. Each of the four "field placement" applications filed requested permission to deposit fill on the entire parcel of land. These applications, however, were only appropriate for depositing fill on land *outside* of a FP area, and according to the City, part of the subject land was still technically designated as FP land. The first application was not signed; the second and third applications were signed by Nealy, even though each application stated it must be signed by the landowner; and the fourth application was signed by Currey. None of these four applications, however, was the proper application to remove the FP designation.

To properly remove the FP designation, the City required that the landowners obtain a LOMA *and* follow section 51-5.102 of the Dallas Development Code. *See* DALLAS, TEX., DALLAS CITY CODE §§ 51-5.102(a), (e)(1987). Under that section, there are three ways to remove a FP designation:

> (1) The director of public works may recommend to the city council that an FP prefix be . . . removed from the official zoning district map based on continuing hydraulic and hydrologic engineering studies[;]
>
> (2) An owner of property located within an FP area may apply for a fill permit and removal of the FP prefix by following the procedure outlined in Section 51-5.105[; or]
>
> (3)(A) The director of public works may cause an FP prefix for an area to be removed from the official zoning district map without a public hearing and without the approval of the city council if he determines, based on engineering studies or a field survey, that the area is not subject to flooding.

See id. § 51-5.102(a).

The first subsection requires hydraulic or hydrologic engineering studies. However, there is no evidence that the trial court ordered any such studies or that the landowners supplied such studies to the director of public works to enable the director to remove the FP prefix from the official zoning district map.

The second subsection references section 51-5.105, which governs filling in the flood plain. Section 51-5.105 demands that a person refrain from depositing fill in a FP area until he or she has obtained a FP "fill permit" from the director of public works and all required state and federal permits. *See id.* § 51-5.105(a). The landowners, however, never submitted a FP fill permit application with the director of public works.

The third subsection requires either an engineering study or a field survey. Currey testified that he never submitted an engineering report to the City. He had a survey conducted of his property sometime around 1994, and he used that survey to get his LOMA from FEMA in 1996. However, he never submitted that survey to the department of public works for its determination about whether it would suffice for purposes of this subsection. Importantly, the purpose of the court-ordered surveys discussed in the first issue above was to inform the parties of the FP area so everyone would know exactly where Currey could legally deposit clean fill; the purpose was not to give Currey the means to comply with subsection 51-5.102(a)(3)(A). However, even if the latter purpose had been true, there was ample evidence from the surveyor that Currey resisted the City's attempts to conduct these surveys. In sum, the record indicates that the landowners did not provide the City with an engineering study or a field survey.

Contrary to Currey's and Flowerdale's assertion, this case is not like *Mayhew*, where the landowner spent over a year

negotiating with the Town, expended over $500,000 in preparing and developing its application, and compromised by altering its application to make less profitable use of their land. *Mayhew*, 964 S.W.2d at 929, 931. Here, the landowners made no earnest attempts to comply with the appropriate city ordinance. Likewise, this case is not like *Kolb*, where the court concluded the landowners satisfied the finality requirement because the City was unable to make the necessary changes to the property. *Kolb*, 982 S.W.2d at 954. The City in this case would have had the authority to act had the landowners given it the opportunity to act.

Because the landowners did not approach the level of exhaustion required to comply with section 51-5.102 to have the FP designation removed from his property, they did not give the City a meaningful opportunity to make a final determination on the matter. Without a final decision regarding the application of the regulations to the property at issue, the landowners' "taking" counterclaim never ripened.

Ripeness – Federal Claims

In related matter, the City has filed a motion with this Court asking that we dismiss the landowners' federal "taking" claim for lack of subject matter jurisdiction on the basis that they did not seek and were not denied compensation using adequate procedures provided by state law.

If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation

of the Takings Clauses[6] until it has used the procedure and been denied just compensation. *Williamson County*, 473 U.S. at 195, 105 S.Ct. at 3121. Texas law provides an adequate procedure for obtaining just compensation: Article I, Section 17 of the Texas Constitution, which provides in part that "no person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation being made . . . ." TEX. CONST. art. I, § 17; *Felts v. Harris County*, 915 S.W.2d 482, 484 (Tex. 1996).

Here, the landowners have not yet suffered a concrete injury under the Fifth Amendment ofthe United States Constitution because, as explained above, they have not yet been denied just compensation under Texas law. Although we agree with the City that the trial court was without subject matter jurisdiction to adjudicate the landowners' federal "taking" claim because it was not yet ripe, the landowners argue that the trial court had subject matter jurisdiction on other federal, constitutional claims that are not subsumed by the Takings Clause, namely substantive due process, which serves to prevent governmental power from being used for purposes of oppression, and equal protection, which protects individuals from governmental action that works to treat similarly situated individuals differently. *See John Corp. v. City of Houston*, 214 F.3d 573, 577 (5th Cir. 2000).

In their response, the landowners rely on the trial court's findings of fact, which they argue are binding on this Court because the City never objected to them. Specifically, those findings stated that (1) the City intentionally, unreasonably,

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[6] The Just Compensation Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation," U.S. CONST. Art. V; *Mayhew*, 964 S.W.2d at 933. This prohibition has been incorporated through the Fourteenth Amendment to apply to the individual states. *Mayhew*, 964 S.W.2d at 933.

and arbitrarily denied the landowner all economically viable use of the subject property (implied substantive due process claim); and (2) the City treated Currey and Flowerdale differently from other landowners similarly situated (implied equal protection claim). The landowners maintain that despite any lack of pleading on their part, these federal constitutional claims were tried by implied consent, as provided by Texas Rule of Civil Procedure 67.

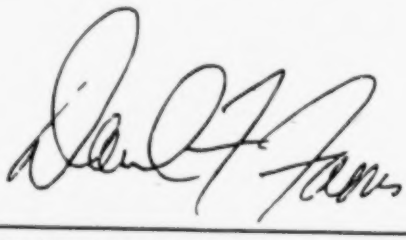
Rule 67 provides in pertinent part that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." TEX. R. CIV. P. 67. The rule of trial by consent is limited to those exceptional cases where the parties clearly tried an unpled issue by consent. *In re Walters*, 39 S.W.3d 280, 289 (Tex. App–Texarkana 2001, no pet.). The rule should be applied cautiously, not in doubtful situations, and only where it appears from the record that the issue was actually tried, although not pled. *Id.* To determine whether an issue was tried by consent, we must examine the record for evidence of trial of the issue, rather than evidence of the issue. *Id.*

After reviewing the record, we conclude the parties did not clearly try the unpled issues of substantive due process (the City's unreasonable and arbitrary denial of the use of the subject property) or equal protection (the City rendered dissimilar treatment among similar landowners); they clearly tried the "taking" issue. Simply stated, this is not one of those exceptional cases where the issues were not pled, but tried by implied consent.

Because we find the federal "taking" claim was not ripe and the federal substantive due process and equal protection issues were not tried by implied consent, we grant the City's "Motion to Dismiss Federal Claims for Lack of Subject-Matter Jurisdiction."

Conclusion

We reverse that portion of the trial court's final judgment dismissing with prejudice all of the City's claims against Currey and remand for further proceedings consistent with this opinion. We reverse that portion of the trial court's final judgment granting Currey's counterclaim and dismiss it for want of jurisdiction. We also grant the City's "Motion to Dismiss Federal Claims for Lack of Subject-Matter Jurisdiction."



DAVID F. FARRIS
JUSTICE, ASSIGNED

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Tex. R. App. P. 47

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

June 27, 2002

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RE: Case Number: 02-0380
Court of Appeals Number: 05-00-01436-CV
Trial Court Number: 94-07642-K

Style: JAMES C. CURREY AND FLOWERDALE, L.L.C.
v.
CITY OF DALLAS

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review, as supplemented, in the above styled case.

Sincerely,
John T. Adams, Clerk

by Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms. Lisa Matz, Clerk
Mr. Jim Hamlin

CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, Defendant and Counter-Plaintiff, AND FLOWERDALE L.L.C., Defendant, vs. LAMER NEALY, Intervenor. JAMES C. CURREY, Third-Party Plaintiff, vs. ELVIN PETERSON and PATSY QUESTED, Third-Party Defendants.	NO. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

ORDER

On the 23rd day of March, 1999, the trial of the counter-claim originally filed by James C. Currey ("Currey") in the above-styled cause was begun. Currey, at the time of trial, represented both himself and Flowerdale L.L.C. as its agent (references to "Currey" in contexts herein prior to May 3, 1995, are to him individually and thereafter are to him as agent for Flowerdale L.L.C.; references to "Landowner" are to Currey individually and as agent for Flowerdale L.L.C.

and to Flowerdale L.L.C. as their respective interests appear on the date of such reference). Defendants' Motion to Establish Date of Taking (the "Motion") was the first matter to be considered by the Court. All parties appeared by their respective attorneys of record and announced ready for trial. After considering the Motion, the proof supporting and opposing the Motion, the briefs and authorities cited by counsel, and the evidence presented, the Court finds the following:

1. that the Motion has been made in the proper form and is supported by competent evidence;

2. the service of the Counterclaim and the Motion and notification of the trial have been made as required by law and that trial hereof commenced on March 23, 1999;

3. that this Court has jurisdiction over the subject matter and the parties;

4. that the matters contained in the Motion are ripe for determination;

5. that the property that is the subject of this Counterclaim and Motion (the "Subject Property") is part of a tract of land which at the time of filing this Counterclaim in 1994 was wholly owned by Currey, and which tract of land on May 3, 1995, was conveyed by deed to his successor, Flowerdale L.L.C., for which Currey thereafter continued to act as agent in this litigation concerning the Subject Property;

6. that the Subject Property is located at 3200 Stag Road, Dallas, Dallas County, Texas, being that property in Dallas City Block 6860 and designated as flood plain (FP) on the City of Dallas Zoning Maps and on the Flood Insurance Rate Map ("FIRM") of the Federal Emergency Management Agency ("FEMA") Community-Panel No. 480171 0175 D, City of Dallas, Texas Panel 175 of 235, dated July 2, 1991,

and containing 100 acres of land, more or less as delineated in Plaintiff's Exhibits 1, 2, and 5, previously filed herein;

7. that the City's designation of the Subject Property as FP (Flood Plain) and its subsequent maintaining of the FP designation thereon, was based upon FEMA's determination that the Subject Property was in the 100-year flood plain;

8. that Currey, believing the Subject Property to have been improperly included in the 100-year flood plain, demanded in 1994 that the City discontinue its designation thereon;

9. that the City, did not respond to Currey's demand; instead, it refused to remove the FP designation or to initiate studies/surveys to justify an FP designation even after being initially ordered by this Court to stake and to survey the Subject Property;

10. that Currey thereafter applied to FEMA for removal of the Subject Property from the designated flood plain (FP);

11. that FEMA, in response to Currey's application, requested, and Currey thereafter supplied, the necessary empirical evidence to establish under FEMA criteria that the Subject Property was not in the flood plain;

12. that a Letter of Map Amendment ("LOMA") which is still in effect was thereupon issued by FEMA on March 7, 1996, declaring that the Subject Property is not in the 100-year flood plain;

13. that FEMA contemporaneously notified the City of the LOMA and directed the City to append the LOMA to the City's flood plain maps;

14. that the City, in response to FEMA's directive, intentionally failed and refused at that time to remove the FP designation from the Subject Property and to append the

LOMA to the City's flood plain maps; and instead, it telephonically and by letter of June 12, 1996, questioned FEMA as to whether the issuance of the LOMA was justified;

15. that FEMA, in response to the City's inquiries, specifically informed the City by letter dated July 16, 1996, that the prior LOMA was justified based on empirical evidence submitted by Currey;

16. that the City did not reveal to Currey its inquiries by telephone or the July 16, 1996 LOMA response letter until produced pursuant to discovery in this Counterclaim some two years hence;

17. that the City, after receiving the July 16, 1996 reaffirmation from FEMA, again intentionally refused to append the LOMA to the City's flood plain maps and to remove the FP designation from the Subject Property, continued to disregard orders of this Court, and failed to initiate any study/survey independently to determine whether the Subject Property was in the flood plain or whether maintaining the FP designation was still justified;

18. that the City, by Orders dated August 23, 1994, and May 5, 1995, agreed to and was required by this Court, and on March 23, 1998, was unilaterally ordered by this Court, to perform surveys of and to stake the flood plain on the Subject Property, which surveying and staking the City failed and refused to perform;

19. that in 1997, Currey, having failed to get the City either to remove the FP designation or to justify its continued enforcement thereof, made reasonable efforts to obtain fill permits for the Subject Property, which permits were denied by the City;

20. that Currey, by his aforementioned conduct, took all reasonable steps necessary to remove the City's FP designa-

tion from the Subject Property, and thus exhausted his administrative remedies;

21. that the City's decision to retain the FP designation on the Subject Property, despite FEMA's determination and without further justification for its existence, was knowing, intentional and final;

22. that the existence of the FP designation on the Subject Property has had a severe and detrimental impact on the permitted uses of, and correspondingly on the market value of, the Subject Property, and effectively denies that Landowner all economically viable use of the Subject Property;

23. that the City has intentionally, unreasonably and arbitrarily interfered with the Landowner's right to use and enjoy the Subject Property, and has intentionally, unreasonably, and arbitrarily denied the Landowner all economically viable use of the Subject Property.

24. that the City by its actions has treated the Landowner and his representatives differently from other landowners similarly situated without any reasonable basis for doing so;

25. that acts of the City concerning the Subject Property have been irrational and constitute arbitrary and unreasonable activity considering the existing and permitted uses of property comparable to the Subject Property;

26. that there has been a significant economic impact on the Subject Property to the degree that actions by the City have interfered with distinct investment-backed expectations of the Landowner;

27. that the City, by its aforementioned conduct, is deemed to have appropriated the Subject Property for its own use without compensation to the owner of the Subject Property, effective March 7, 1996, so as to constitute a

"taking" of the Subject Property under Article I, § 17 of the Texas Constitution and Article V of the Bill of Rights of the United States Constitution; and

28. that the owner of the Subject Property has been damaged and should recover monetary damages from the City which result from the taking in an amount equal to the market value of the Subject Property on March 7, 1996, damages accruing to any remainder, and interest thereon from the date of taking.

WHEREFORE, it is accordingly hereby ORDERED as follows:

1. That Defendants' Motion to Establish Date of Taking is hereby granted.

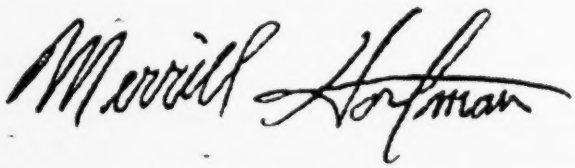
2. That the approximately 100 acres of land located within the City of Dallas, Texas, in Dallas City Block 6860, belonging to Landowner, presently designated as FP by the City of Dallas on its official zoning maps and delineated on Plaintiff's Exhibits 1, 2, and 5 (to be more definitively described in a final judgment) has been permanently taken from Landowner by the City as of March 7, 1996, for public use without compensation by the City or consent of the Landowner.

3. That the City and Landowner will proceed with trial in this matter to determine the fair market value of the Subject Property and damages, if any, to the remainder as of March 7, 1996.

4. That the entry of this Order is intended as a final resolution of all issues concerning the establishment of a taking of the Subject Property by inverse condemnation by the City and the date of said taking, leaving the only issues to be finally determined to be those of just compensation due to the Landowner for the permanent taking of the property and damages to its remainder, if any.

5. That the trial of the counterclaim herein shall continue forthwith to determine the just compensation due Landowner from the City.

DONE AND ORDERED this 26th day of August, 1999.



MERRILL HARTMAN
JUDGE, 192ND DISTRICT COURT

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Appendix D

PROCEDURES FOR FILLING IN A FLOOD PLAIN UNDER THE FLOOD PLAIN MANAGEMENT GUIDELINES

CITY OF DALLAS
DEPARTMENT OF PUBLIC WORKS & TRANSPORTATION
FLOODPLAIN MANAGEMENT & EROSION CONTROL DIVISION

PROCEDURES FOR REMOVING THE "FP" PREFIX

The sequence and timing of procedures for review of fill requests in areas designated by the "FP" prefix are outlined in the accompanying chart. The procedures can be divided into a number of stages: pre-application, application and review, public hearing, fill operation and verification, and FEMA/Zoning map update.

Pre-application: Particularly in areas not governed by a management plan, staff encourages the potential applicant to arrange a meeting with representatives from all three departments to discuss the criteria and their relationship to his site prior to preparing or submitting any documents for his application. This will often reduce the cost and time of his preparation, and the City's review of the application.

The Department of Public Works & Transportation will assist consulting engineers by supplying them with an electronic data file of the existing hydraulic conditions model, if available, and discussing additional cross sections that may be needed to describe the fill area. Planning and Development will be able to identify any special environmental features on the proposed site and discuss the nature of environmental concerns in the area. The possibilities of public acquisition or incentives for preserving the flood plain as private open space could also be explored in this stage; before the applicant invests in detailed engineering design for his property.

Application and Review: When the applicant has all materials necessary for formal application, he submits his fill permit application, CDC permit application, if applicable, and materials along with a filing fee to the Department of Public Works & Transportation, Flood plain Management & Erosion Control Division. Copies of the appropriate materials are then routed by this division to the other departments, as

well as other City agencies that may be affected by the proposal, including the Corps of Engineers and NCTCOG where a Corridor Development Certificate (CDC) is required. If the project is located within the non-encroachment area of the regulatory floodway as established by FEMA, then the applicant must secure a Conditional Letter of Map Revision (CLOMR) from FEMA prior to any City approval. The applicant will be promptly notified if his application is incomplete, in which case processing will halt until all additional material required for adequate staff review has been provided.

The complete application is then reviewed by the departments, using the management plan guidelines or the criteria adopted by the Council in Resolution 76-2940 for all areas not covered by management plans. In some cases an "on-site" neighborhood meeting would be held to discuss the proposed project with adjacent property owners. If staff feels an "on-site" meeting is necessary the applicant will be instructed to mail notification to adjacent property owners within two hundred feet of the proposed project. The meeting will be conducted by the applicant and/or the applicant's engineer. City staff will be available to answer any questions pertaining to the City's criteria.

If no major issues are raised in the initial review period, Public Works staff will coordinate a joint recommendation for submission to the City Council through the City Manager. The applicant will be notified of the joint staff recommendation and the date for Public Hearing by the City Council.

If some major issues are raised, such as potential purchase for park land or non-compliance with one or more of the engineering criteria, the applicant will be notified and given the opportunity to meet with representatives from one or more of the departments to discuss those issues. The

applicant may then decide to proceed with his request as originally submitted, or to revise his submission in response to staff comments, or to hold or withdraw his application while exploring possible park land acquisition or incentives which would modify or eliminate the need for a fill permit. In all cases the applicant must meet all the ten criteria as a minimum in order to receive a staff recommendation of approval.

If the applicant decides to modify his proposal to overcome problems identified by staff review, scheduling of his case will be delayed and the applicant given adequate time to modify and resubmit his proposal. Such modifications should be submitted to the Flood plain Management and Erosion Control Division for rerouting of the fill permit application.

Conditional Letter of Map Revision (CLOMR) Requirements: A Conditional Letter of Map Revision is a letter from FEMA commenting on whether a proposed project, if built as proposed, would justify a map revision, or proposed hydrology changes. Most fill permit requests once complete, will require formal submittal to FEMA for a Letter of Map Amendment (LOMA)/Letter of Map Revision (LOMR). However, as per Section 51A-5.105 of the Dallas Development Code, an encroachment into the regulatory floodway is prohibited unless FEMA issues a Conditional Letter of Map Revision (CLOMR) and a registered professional certifies that the encroachment will not result in any increase in the design flood elevation. This requirement must be met prior to any City Council approval.

Requests for a CLOMR should be addressed to FEMA's Technical Evaluation Contractor at the address below. Allow four to five weeks for processing.

LOMA Manager, Team West
Michael Baker Corporation
3601 Eisenhower Avenue, Suite 600
Alexandria, Virginia 22304
Phone: (703) 317-6250

Public Hearing: The Director of Public Works & Transportation will submit the joint staff recommendation to the City Council through the City Manager. The Department of Public Works & Transportation will ensure that the Public Hearing is advertised as required by the Flood plain Ordinance and notices are sent to all property owners.

Fill Operation and Verification: If the application is approved at the Council hearing, the applicant will obtain a fill permit from the Director of Public Works & Transportation and may conduct fill operations. Fill materials must consist of natural materials such as dirt, rock, gravel or concrete. Fill must be compacted to 95 percent Standard Proctor. No boards, sheetrock, trees, trash, or decomposable matter shall be used without a Special Use Permit from the State. Any dumping of such materials may result in ticketing and revoking of the permit.

During construction, straw bale dikes, silt fences, or similar methods must be used to prevent erosion and downstream transport of excess sediment. If compliance with an NPDES permit is required for construction activities, a copy of the Notice of Intent (NOI) or individual NPDES permit must be submitted before beginning fill operations. Upon completion of the fill, the applicant will be required to submit to Public Works an "as filled survey", certified by a registered professional engineer that the fill has been placed

accordingly to the approved plans, with acceptable material only.

FEMA Update — Letter of Map Amendment (LOMA)/ Letter of Map Revision (LOMR) — The City of Dallas Flood plain Administrator is responsible for ensuring that the community meets its obligations as a participant in the National Flood Insurance Program. To provide a sound basis for flood plain management and insurance rating, NFIP maps must present flood risk information that is correct and up to date. The NFIP regulations require that each participating community inform the Federal Emergency Management Agency (FEMA) of any physical changes that may effect the base flood elevation (BFE) in the community and within 6 months of the date such changes occur, submit data that shows effects of those changes.

When a map revision is warranted, the individual property owner, developer or engineer who wishes to have the NFIP map revised must submit a request to FEMA. The requestor should coordinate with the City's Flood plain Administrator for support of the project.

If the project is in compliance with the City's "Ten Point" engineering criteria, a letter will be provided to FEMA in support of the project. The City will not however, be responsible for submitting any required material, technical or non-technical, or be responsible for any of the fees charged by FEMA for revision of the map.

Requests should be addressed to
FEMA's Technical Evaluation Contractor:

LOMA Manager, Team West
Michael Baker Corporation
3601 Eisenhower Avenue, Suite 600
Alexandria, Virginia 22304
Phone: (703) 317-6250

NOTE: In order to expedite the final processing of obtaining a LOMA/LOMR from FEMA the applicant should consider submitting an application for a Conditional Letter of Map Revision (CLOMR) as the City's fill permit is being processed. This will allow the applicant to obtain the LOMA/LOMR by submitting as built plans and as filled survey to FEMA.

For questions regarding FEMA's fees for flood mitigation projects contact and/or other FEMA facts contact:

Federal Emergency Management Agency
Hazards Identification & Risk Assessment Division
500 C Street SW.
Washington, DC 20472
Telephone: (202) 646-3860
Facsimile: (202) 646-4596

FEMA's World Wide Web site
(http:/www.fema.gov/MIT/feesch.htm) or by calling the
FEMA Fax-on-Demand, at (202) 646-3362, and
requesting
Document Number 20018.

Zoning Map Update: In order for the flood plain "FP" prefix to be removed from the official City zoning map, the applicant must receive a Letter of Map Amendment/Letter of Map Revision from the Federal Emergency Management Agency (FEMA). It is the applicants responsibility for securing the LOMA/LOMR from FEMA. Once the City of Dallas receives official notification that a LOMA/LOMR will be issued for revision of the Flood Insurance Rate Map (FIRM), then the Department of Public Works & Transportation will notify Planning and Development to revise the zoning maps by removing the "FP" prefix.

PROCEDURES FOR FILLING IN A FLOOD PLAIN UNDER THE FLOOD PLAIN MANAGEMENT GUIDELINES

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Appendix A: Council Resolution 762940, adopting the "Ten Point" engineering criteria, approved November 8, 1976.

Appendix B: Excerpts from Part II, Dallas Development Code — Flood plain Regulations from Section 51A-5.102 — Designation of FP Areas, Section 51A-5.103.1 — Vegetation Alteration in Flood plain Prohibited, Section 51A-5.104 — Uses and Structures Permitted, and Section 51A-5.106 — Setback from Natural Channel Required.

Appendix C: Excerpts from Part II, Dallas Development Code — Enforcement from Section 51A-103 — Criminal Prosecution.

Introduction

This booklet provides, for property owners, developers, engineers, and other interested parties, explanations of City of Dallas regulations, guidelines, and procedures for taking land out of a flood plain. The regulations and guidelines described are part of a larger program of flood plain management, which includes flood plain delineation, the development of area-specific flood plain management plans, flood insurance, and flood warning systems. The purpose of the City's flood plain management program are to minimize hazards to life and property, to ensure compliance with the National Flood Insurance Program, and to otherwise promote the health, safety, and general welfare of the community.

Most land in the City which has a history or potential for flooding is designated by the Flood Plain "FP" prefix on the official zoning maps. Section 51A-5.101, Dallas City Code, Part II of the Dallas Development Code, describes the flood plain regulations, uses and structures permitted, and also sets out the conditions for development in the flood plain and/or removal of the "FP" designation by filling.

The Dallas City Code also sets forth guidelines for evaluating the removal of the "FP" prefix and for alterations of the flood plain not yet designated with an FP prefix on the official zoning district map. Land which is not designated as "FP", but is found to be flood-prone by the City staff in the course of reviewing sub-division plats, building permit review, or other development proposals, will also be governed by these criteria. Flood prone areas which have specific flood plain management plans will be regulated by the management plan requirements rather than the criteria contained in Section 51A-5.101 of the Dallas City Code.

Appendix A

November 8, 1976

WHEREAS, there is a need to develop an overall flood plain management program including a systematic approach to decisions on applications for removal of the "FP" zoning prefix; and

WHEREAS, there is a concern on the part of the City that storm water be moved naturally rather than relying on extensive and costly systems of channel improvements, that development be permitted where it would not create other flood problems and where acquisition of property is not required for ecological, scenic, or recreational reasons, that the City maintains its eligibility in the Federal Flood Insurance Program by assuring protection against loss of lives and property in the flood plain, that ecologically and scenically valued areas in the flood plain are preserved where possible, and that a reasonable amount of the flood plain be provided in public ownership to meet the recreational open space needs of the community; Now, Therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS, TEXAS:

Section 1. That the City Council hereby adopts the attached engineering criteria, ecological and scenic resource criteria, and recreation criteria, as interim administrative guidelines to be applied to all creeks which do not have special adopted flood plain management plans.

Section 2. That the City Manager and Park Board be and are hereby instructed to seek all possible sources of revenue for acquisition of flood plain land for open space and recreation use where warranted.

Section 3. That these criteria are to be reviewed periodically, with the first report in six (6) months after passage of this resolution. That the periodic review cover the effectiveness of the criteria based on experience and their effect on flood plains, and further that the Department of Urban Planning and Park Department continue with current studies, specifically the creek study and the up-date of the recreation of open space plan. These studies will result in more precise standards and guidelines as well as the refinement of the open space component of the Comprehensive Plan.

Section 4. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so resolved.

Approved as to form:
LEE E. HOLT, City Attorney
By _____
Assistant City Attorney

APPROVED BY
CITY COUNCIL
NOV 8 1976
_____
City Secretary

31

APPROVED _____ APPROVED _____ APPROVED _____
HEAD OF DEPARTMENT CITY AUDITOR CITY MANAGER

Appendix B: Excerpt from Part II of the Dallas Development Code — Floodplain Regulations

Section 51A-5.102. Designation of FP Areas.

A) *Initiation.* A flood plain designation is not a zoning classification, but refers to a specific area subject to flooding. When this designation is noted by a "FP" prefix on the official zoning map the area designated is referred to in this article as a FP area. FP areas include the areas that have been identified as areas of special flood hazards by the Federal Emergency Management Agency in the March 16, 1983, flood insurance study, as revised, for Dallas, Texas, and that has been officially designated as FP areas by the City Council. The addition to or removal from the official zoning district of an FP prefix may be initiated in the following ways:

1. The Director of Public Works may recommend to the City Council that an FP prefix be added to or removed from the official zoning district map based on continuing hydraulic and hydrologic engineering studies.

2. An owner of property located within an FP area may not apply for a fill permit and removal of the FP prefix by the following procedure outlined in Section 51A-5.105.

3. The Director of Public Works may cause an FP prefix for an area to be removed from the official zoning district map without a public hearing and without the approval of the City Council if he determines, based on engineering studies or a field survey, that the area is not subject to flooding.

Section 51A-5.103.1. Vegetation Alteration in Floodplain Prohibited.

A) A person commits an offense if he removes or injures any vegetation within a floodplain.

B) It is a defense to prosecution under Subsection(a) if the act is:

1. authorized in advance in writing by the Director of Public Works;

2. in conformance with a landscape plan approved by the Director of Public Works;

3. routine maintenance of vegetation such as trimming or cutting designed to maintain the healthy or attractive growth of the vegetation; or

4. routine maintenance of the flood plain to maintain the floodwater conveyance capacity of the floodplain performed, required, or authorized by the City (Ord Nos. 19455, 19786).

Section 51A-5.104. Uses and Structures Permitted.

A) *Uses Permitted.* To allow for appropriate development of land which is subject to flooding without unduly endangering life and property, the following uses are permitted in an FP area provided they are permitted in the underlying zoning district and comply with the requirements of Section 51A-5.105(g) and all applicable elevation requirements of the Federal Emergency Management Agency:

1. Farm or Ranch

2. Local utilities, electrical substation, detention basin, water reservoir or pumping station, and water treatment plant.

3. Sanitary landfill and refuse transfer station.

4. Public park or playground, private recreation club or area, private community center, and golf course.

5. Outside commercial amusement approved by a specific use permit.

6. Helistop approved by a specific use permit.

7. Radio, television, or microwave tower, and amateur communications tower.

B) *Development Permitted.*

1. A structure customarily associated with a use listed in Subsection (a) may be constructed with an FP area only if the director of public works determines that the proposed structure meets the same engineering requirements applicable to filling in Section 51A-t.105(g) and issues a fill permit.

2. The owner of a structure in an FP area shall not make any improvements to the structure without first obtaining approval from the Director of Public Works. The Director of Public Works may approve a one-time improvement that does not exceed 50 percent of the assessed value of improvements on the property. No substantial improvements are permitted. Any improvements must comply with Section 51A-5.105(g).

3. The board of adjustments may grant a special exception to allow the reconstruction of a structure in an FP area upon a showing of good and sufficient cause, a determination that failure to allow the reconstruction would result in exceptional hardship to the property owner, and a determination that the reconstruction will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimize of the public, or conflict with other local laws. The board may not grant a special exception to authorize reconstruction within any designated floodway if any increase in

flood levels during the base flood discharge would result. Any special exception granted must be the minimum necessary, considering the flood hazard, to afford relief. The reconstruction of a structure in an FP area may not increase the lot coverage of the structure.

Section 51A-5.106. Setback from Natural Channel Required.

NATURAL CHANNEL SETBACK LINE means that setback line described below located farther beyond the crest:

A) That line formed by the intersection of the surface of the land and the vertical plane located a horizontal distance of 20 feet beyond the crest.

B) That line formed by the intersection of the surface of the land beyond the crest and a plane passing through the toe and extending upward and outward from the channel at the designated slope. For purposes of this paragraph, the designated slope is:

- four to one if the channel contains clay or shale soil; and
- three to one in all other cases.

CREST means that line at the top of the bank where the slope becomes less than four to one.

TOE means that line at the bottom of the bank where the slope becomes less than four to one.

1. Except as otherwise provided in Subsection (c), all structures must be located behind the natural channel setback line.

2. A structurally engineered retention system approved by the Director of Public Works may be substituted for the setback required in Subsection (b). (Ord. 19786).

Appendix C: Excerpt from Part II of the Dallas Development Code Enforcement.

Section 51A-1.103. Criminal Prosecution.

1. A person who violates any provision of this chapter is guilty of a separate offense for each day or portion of a day during which violation is continued. Each offense is punishable by a fine of not more than $2,000, nor less than $200. The minimum fine established in this paragraph shall be doubled for the second conviction of the same offense within any 24-month period and tripled for the third and subsequent convictions of the same offense within any 24 month period. At no time shall the minimum fine exceed the maximum fine established in this paragraph.

2. A person is criminally responsible for a violation of this chapter if:

a) the person commits the violation or assists in the commission of the violation; or

b) the person owns part or all of the land or a structure on the land where the violation exists.

3. The person may not use land or a structure on land located in the city for other than those uses designated as permitted uses in accordance with the provisions of this chapter.

4. It is a defense to prosecution under this chapter that a person is in compliance with an order of the board of adjustment that specifically authorizes otherwise unlawful conduct.

5. If is a defense to prosecution under this chapter that a use or structure is nonconforming unless the nonconforming rights attendant to the use or structure have been lost or terminated under Section 51A-4.704.

a. *Civil action.* This chapter may be enforced through civil court action as provided by state law.

b. *Utility Disconnection.* The building official may order city or private utilities to be disconnected upon failure to comply with this chapter or the building laws.

c. *Enforcement Authority.* This chapter may be enforced by the building official or any other representative of the city. (Ord. Nos. 19455; 19963; 20236; 20599)

CITY OF DALLAS, TEXAS, Plaintiff, VS. LAMAR NEELEY, Defendant,	NO. 94-07642 IN THE DISTRICT COURT ___TH JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION AND PRAYER FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the City of Dallas, hereinafter referred to as Plaintiff, complaining of Lamar Neeley, hereinafter referred to as Defendant, and for cause of action would respectfully show unto the court the following:

I.

The City of Dallas is a home-rule municipal corporation situated in Dallas County, Texas, incorporated and operating under the laws of the State of Texas.

II.

Lamar Neeley is an individual and is the owner of a tract of approximately 133.426 acres located on the south side of the 3200 block of Stag Road, and at the dead end in the 5000 block of Wadsworth Drive, being City Blocks 5835 and 6860, in the City of Dallas, Dallas County, Texas. Service of Process may be made upon Defendant by serving the defendant at County, Texas.

III.

The property in question is located in the County of Dallas, Texas. Approximately two-thirds of the property is located within a Flood Plain of a Five Mile Creek, in an area defined under the Dallas City Code as "undesignated Flood Plain."

IV.

Section 51A-5.105 of the Dallas City Code entitled "FILLING IN THE FLOODPLAIN" expressly mandates in (a)(1) that:

> A person shall not deposit or store fill, place a structure or excavate in a FP area until he has obtained from the Director of Public Works a fill permit allowing the property to be developed at a specified elevation in compliance with this section, and he obtains all required state and federal permits.

A certified copy of Section 51A-5.105 of the Dallas City Code is attached hereto and incorporated herein as Plaintiff's Exhibit A.

V.

Defendant has deposited illegal fill material on the property without a permit. To date, at least five dump truck loads of fill dirt have been deposited and stored illegally without a permit. Such illegal fill creates an obstruction and blockage of the Five Mile Creek Flood Plain, posing an imminent threat to the safety and welfare of the surrounding community.

VI.

Defendant has been informed by representatives of the City of Dallas that such illegal fill constitutes a violation of the Dallas City Code and presents a safety hazard. Specifically, on March 28, 1994, an employee of the Dallas Public Works Department observed dump trucks filling in flood plain, and informed Defendant that such actions in filling the Flood Plain were illegal.

Again, on March 31, 1994, the same employee observed trucks filling in flood plain, and issued a citation to the individual who represented himself to be the owner of the property. Defendant has willfully and intentionally continued to violate the Dallas City Code, as described herein, to the present time. It is for these reasons that Plaintiff requests that a Temporary Restraining Order and a Temporary Injunction be issued against Defendant. The affidavit attesting to these facts is attached to the petition as Plaintiff's Exhibit B.

VII.

Section 7A-19 of the Dallas City Code entitled "DUTY TO MAINTAIN PREMISES FREE FROM LITTER" expressly mandates that:

> An owner, occupant, or person in control of private premises commits an offense if he places, deposits, or throws; permits to accumulate; or permits or causes to be placed, deposited, or thrown, any litter on the premises or in or on any gutter or parkway adjacent to the premises or on one-half of that portion of an alley adjacent to the premises, unless the litter has been deposited in an authorized private receptacle for collection.

A certified copy of Section 7A-19 of the Dallas City Code is attached hereto and incorporated herein as Plaintiff's Exhibit C.

VIII.

Section 18-10 (a)(1) of the Dallas City Code entitled "REGULATING THE PROCESSING AND DISPOSAL OF SOLID WASTE MATERIALS" expressly mandates, in relevant part, that:

> A person commits an offense if he disposes of dry or wet solid waste or other waste materials inside the city, other than at a location and in a manner approved by the director of sanitation as complying with state and local law regulating solid waste processing and disposal.

A certified copy of Section 18-10 (a)(1) of the Dallas City Code is attached hereto and incorporated herein as Plaintiff's Exhibit D.

IX.

Section 18-12 (b) of the Dallas City Code, entitled "REGULATING THE COLLECTION AND REMOVAL OF ILLEGALLY DUMPED SOLID WASTE MATERIALS ON PRIVATE PREMISES," expressly mandates, in relevant part, that:

> An owner, occupant, or person in control of private premises commits an offense if he places, deposits, or throws; permits to accumulate; or permits or causes to be placed, deposited, or thrown, solid waste material on those premises, unless the solid waste material has been deposited in an authorized private receptacle for collection.

A certified copy of Section 18-12 (b) of the Dallas City Code is attached hereto and incorporated herein as Plaintiff's Exhibit E.

X.

Defendant has deposited, permitted to be deposited, and permitted to accumulate, litter on the premises owned and controlled by defendant, but not in an authorized private receptacle for collection. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community. Defendant has also disposed of dry solid waste materials other than at a location and in a manner approved by the Director of Streets, Sanitation, and Code Enforcement. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community. Defendant has also deposited, permitted to be deposited, and permitted to accumulate, solid waste materials on the premises owned and controlled by defendant. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community.

XI.

Defendant has been informed by representatives of the City of Dallas that such illegal dumping constitutes a violation of the Dallas City Code and presents a safety hazard. Specifically, on July 22, 1994, an employee of the Dallas Department of Streets, Sanitation, and Code Enforcement observed tractor-trailers loaded with construction debris entering the premises. Other trucks loaded with debris for disposal attempted to enter the property for the purpose of dumping, but were warned that such dumping was illegal, causing such trucks to leave. Such activities have been observed on July 28, 1994, as well. Employees of the City of Dallas have informed Defendant that such dumping is ille-

gal. Because of the unwillingness of the Defendant to cease such illegal dumping operations, Plaintiff requests that a Temporary Restraining Order and a Temporary Injunction be issued against Defendant. The affidavit attesting to these facts is attached to the petition as Plaintiff's Exhibit F.

XII.

Section 211.012 of the Local Government Code allows a municipality to obtain an injunction against violations of a zoning ordinance without providing that Defendant's use of the property in question constitutes a threat to the public health, safety or welfare.

XIII.

Section 54.016 of the Texas Local Government Code allows a municipality to obtain an injunction against violations of an ordinance upon showing of substantial danger or injury or an adverse health impact to any person or to the property of any person other than the Defendant. It is not necessary for the municipality to prove no adequate remedy at law exists. Nor is it necessary for the municipality to show that a criminal prosecution has occurred or has been attempted. Chapter 54 applies because the Flood Plain ordinance involved relates to zoning that provides for the use of land.

XIV.

Pursuant to Section 54.013 of the Local Government Code, venue for an action under Chapter 54 is in the county in which the municipality is located. Accordingly, venue for this matter properly lies in Dallas County.

XV.

Unless this court immediately enjoins the activity of the Defendant, Plaintiff and its citizens will suffer irreparable injury. Through the actions of Defendant, there has been a blockage and obstruction of the Five Mile Creek Flood Plain. There has also been an accumulation of litter, debris, and other solid waste on the tract in question. Defendant is continuing to violate the Dallas City Code in a manner which jeopardizes the health and safety of the persons in the community as well as posing a serious risk of substantial property damage and destruction. Defendant is the lawful owner of the property and, although aware of the illegal activities, has been unwilling to correct or remedy the situation.

XVI.

Defendant's willful and continuing violation of the ordinances of the City of Dallas has left Plaintiff without an adequate remedy at law. Unless this court immediately enjoins the violations of the Defendant, there exists an immediate danger that the health, safety and property of the citizens of Dallas will be permanently damaged.

XVII.

Plaintiff prays that upon notice and hearing, this Honorable Court issue a temporary injunction ordering Defendant to remove all unauthorized and illegal fill material deposited and stored on her property along the White Rock Creek Flood Plain. Plaintiff further prays that upon final trial on the merits, this Honorable Court issue a permanent injunction enjoining Dependant from illegally depositing and storing fill material on the property, and that this court order Defendant to remove all unauthorized and illegal fill depos-

ited and stored on the property before the expiration of ninety (90) days from the entry of final judgment. In the alternative, Plaintiff prays that this Honorable Court permit Plaintiff to remove all unauthorized and illegal fill material from the property at the sole cost and expense of the Defendant, should Defendant not do so before the expiration of ninety (90) days, and that this court issue appropriate orders for the collection of said costs and expenses by Plaintiff from Dependant.

XVIII.

Section 54.017 of the Local Government Code permits a municipality to recover a civil penalty in an amount not to exceed $1,000 per day for a violation of a City of Dallas ordinance. Pursuant to this authority, the City of Dallas requests the court impose a civil penalty for each day of the continuous violations of the Dallas City Code since the date Defendant received notice of the violations.

WHEREFORE, PREMISES CONSIDERED, the City of Dallas prays for the following relief:

1. That a temporary restraining order be issued immediately, enjoining Defendant from storing illegal fill material on the property, within the floodplain, without a permit, and enjoining Defendant from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property;

2. That a temporary injunction be issued enjoining Defendant from depositing and storing illegal fill material on the property without a permit, enjoining Defendant from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property, ordering the removal of all unauthorized and illegal fill material now stored on the property, and ordering the removal of all

illegally deposited solid waste material now deposited on the property;

3. That a permanent injunction be issued enjoining Defendant from depositing and storing illegal fill material on the property without a permit, enjoining Defendant from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property, ordering the removal of all unauthorized and illegal fill material now stored on the property, and ordering the removal of all illegally deposited solid waste material now deposited on the property before the expiration of ninety (90) days from the entry of final judgment in this cause;

4. In the alternative, should Defendant fail to remove all unauthorized and illegal fill material and illegal solid waste material before the expiration of said ninety (90) days, that Plaintiff, City of Dallas, be allowed to remove all unauthorized and illegal fill material and solid waste material deposited and stored on the property at the sole cost and expense of Defendant, and appropriate orders for collection of said costs and expenses by Plaintiff from Defendant to be issued concurrently with the permanent injunction;

5. That the court impose a civil penalty against Defendant for each day of continuous violations of the Dallas City Code since the date Defendant received notice of the violations; and

6. That Plaintiff recover its costs incurred including attorney's fees, and for such other and further relief, general or

special, at law or in equity, to which this Plaintiff may show itself justly entitled.

Respectfully submitted,

OFFICE OF THE CITY
ATTORNEY
CITY OF DALLAS, TEXAS
1500 Marilla Street, 7BN
Dallas, Texas 75201
(214) 670-3510
Telecopier — (214) 670-3515

By

RONALD D. STUTES
Assistant City Attorney
State Bar of Texas
No. 19452600

FIAT

The time is hereby specified for a hearing on this Temporary Injunction on the ____ of July 1994, at ____-o'clock _.M.

_____

JUDGE PRESIDING

CITY OF DALLAS

STATE OF TEXAS:
COUNTY OF DALLAS:
CITY OF DALLAS:

I, ROBERT S. SLOAN, city secretary of the City of Dallas, Texas, do hereby certify that the attached is a true and correct copy of

Section 5.105 of **Chapter 51A**

of The Revised Code of Civil and Criminal Ordinances of the City of Dallas as amended through May 27, 1992.

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, this the **11th** day of **JANUARY, 1994.**

ROBERT S. SLOAN
City Secretary
City of Dallas, Texas

CITY OF DALLAS TEXAS

(4) All parking spaces must be a minimum of two feet above the design flood elevation.

(5) Manufactured homes may not be placed in manufactured home parks, courts, or subdivisions within flood plain areas unless all of the following requirements are met:

(A) The manufactured home park, court, or subdivision where the manufactured home is to be placed must have been an existing development prior to March 16, 1983, the effective date of the City of Dallas Flood Insurance Rate Map.

(B) All manufactured homes to be placed within a flood plain area must be installed using methods and practices that minimize flood damage.

(C) The lowest floor of a manufactured home must be elevated one foot above the design flood elevation, and the home must be anchored to resist flotation, collapse, or lateral movement. An acceptable method of anchoring includes but is not limited to the use of over-the-top frame ties to ground anchors. Applicable state anchoring requirements for resisting wind forces must be met. A registered land surveyor shall submit a certification to the Director of Public Works that elevation requirements are satisfied.

(D) Enclosure of areas below the lowest floor of a manufactured home placed within an FP area must be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must be

certified by a registered professional engineer or architect and must satisfy the following minimum criteria:

(i) A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding must be provided.

(ii) The bottom of all openings must be no higher than one foot above grade. Openings may be equipped with screens, louvers, valves, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.

(6) No manufactured home may be placed within a floodway.

(c) *Construction standards.* All improvements and construction permitted in an FP area must comply with the following requirements:

(1) Structures must be:

(A) designed and securely anchored to the foundation to prevent flotation and collapse during inundation; and

(B) designed to prevent damage to nonstructural elements during inundation.

(2) Thermal insulation used below the first floor level must be of a type that does not absorb water.

(3) Adhesives must have a bonding strength that is unaffected by inundation.

(4) Doors and all wood trim must be sealed with a water-proof paint or similar product.

(5) Electrical, heating, ventilation, plumbing, air-conditioning equipment, and other service facilities must be designed and located to prevent water from entering or

accumulating in the components during conditions of flooding.

(6) Basements are permitted only if they are designed to preclude inundation by the 100-year flood level, either by:

(A) the elimination of exterior openings below the 100-year flood level; or

(B) the use of water-tight closures, such as bulkheads and flood shields. However, no basements are permitted in soils whose permeability meets or exceeds the minimum local standards of permeability established for the installation of individual sewage disposal systems.

(7) Plywood used at or below the first floor level must be of an "exterior" or "marine" grade and of a water-resistant or waterproof variety.

(8) Wood flooring used at or below the first floor level must be installed to accommodate a lateral expansion of the flooring, perpendicular to the flooring grain, without incurring structural damage to the building.

(9) Basement ceilings must be of sufficient wet strength and be so installed as to survive inundation.

(10) Paints or other finishes used at or below the first floor level must be capable of surviving inundation.

(11) All air ducts, large pipes and storage tanks located at or below the first floor level must be firmly anchored to prevent flotation.

(12) Tanks must be vented at a location above the 100-year flood level. (Ord. Nos. 19455; 19786; 20360)

SEC. 51A-5.105. Filling in the Flood Plain.

(a) *Permit required.*

(1) A person shall not deposit or store fill, place a structure or excavate in an FP area until he has obtained from the director of public works a fill permit allowing the property to be developed at a specified elevation in compliance with this section, and he obtains all required state and federal permits.

(2) The director of public works shall maintain a record of all fill permits.

(b) *Initiation.* An applicant for a fill permit shall submit an application to the director of public works. The application must be on a form approved by the director, and must be signed by the owner of the property to be filled.

(c) *Preapplication conference.*

(1) An applicant for a fill permit shall request a preapplication conference with representatives from the department of public works.

(2) At the preapplication conference the director of public works shall determine what information is necessary for a complete evaluation of the proposed fill project, and may require the applicant to submit the necessary information, including, but not limited to the following:

(A) A vicinity map.

(B) The acreage figures for the entire tract, the area located in the flood plain, and the area proposed to be filled.

(C) A description of hydrologic and hydraulic analyses conducted.

(D) A landscape and erosion control plan.

(E) A table of values for analysis of the engineering criteria listed in Subparagraphs (g)(2)(A),(B), and (D).

(F) A water surface profile.

(G) A plan view.

(H) Plotted cross-sections.

(I) An overall map of the project area.

(d) *Filling that does not remove an FP designation.* The director of public works may issue a fill permit without city council action if he determines that:

(1) the filling does not remove an FP designation; and

(2) the filling complies with the engineering requirements for filling in Subsection (g).

(e) *Filling to remove an FP designation.*

(1) If the application is to remove an FP designation, the director of public works shall forward copies of the application to the director of planning and development and director of parks and recreation.

(2) If the director of public works determines that the application complies with all of the requirements of Subsection (g), he shall recommend approval of the application; otherwise he shall recommend denial.

(3) The director of planning and development and the director of parks and recreation shall review the application and advise the director of public works of the environmental impacts of the project and determine whether the applicant's property is appropriate to be considered for public acquisition, based on ecological, scenic, and recreational value of the property.

(4) After notice and hearing in compliance with Section 51A-5.102, the city council shall approve or deny the

application for a fill permit. If the permit is approved, the city council shall by ordinance authorize the removal of the FP designation for the filled area upon compliance by the applicant with the specifications for filling.

(5) Upon compliance by the applicant, the director of public works shall inform the director of planning and development, and the director of planning and development shall remove the FP designation for the filled area from the official zoning district map.

(f) *Filling operations.* If the city council authorizes issuance of a fill permit by the director of public works and removal of the FP prefix from the official zoning district map, the filling operations must comply with the following standards.

(1) If the FP area is governed by a city council adopted management plan, filling operations and subsequent development must meet the standards outlined in that management plan.

(2) If the FP area is not governed by a city council adopted management plan, filling operations and subsequent development must meet the following standards:

(A) Any excavation required by the specifications of the approved application must be conducted before or at the same time as placing fill.

(B) Fill must be placed to at least two feet above the design flood line.

(C) The lowest floor of any structure must be constructed at least three feet above the design flood line.

(3) After filling operations have been completed, the applicant shall submit a certification to the director of public works that proper fill elevations and the specifications of the approved application have been followed. Upon compliance

by the applicant, the director of public works shall inform the director of planning and development, and the director of planning and development shall remove the FP designation for the filled area from the official zoning district map.

(g) *Engineering requirements for filling.*

(1) If the FP area is governed by a city council adopted management plan, the director of public works shall determine whether the proposed fill project meets the engineering requirements outlined in that management plan.

(2) If the FP area is not governed by a city council adopted management plan, the director of public works shall determine whether the proposed fill project meets the following engineering requirements:

(A) Except for detention basins, alterations of the FP area may not increase the water surface elevation of the design flood of the creek upstream, downstream, or through the project area. Detention basins may increase the water surface elevation of the design flood provided the increase is within the detention basin's boundaries as approved by the director of public works.

(B) Alterations of the FP area may not create or increase an erosive water velocity on or off-site. The mean velocity of stream flow at the downstream end of the site after fill may not exceed the mean velocity of the stream flow under existing conditions.

(C) The effects of the existing or proposed public and private improvements will be used in determining water surface elevations and velocities.

(D) The FP area may be altered only to the extent permitted by equal conveyance reduction on both sides of the natural channel.

(E) An environmental impact study and a complete stream rehabilitation program must be approved prior to any relocation or alteration of the natural channel or alteration of an environmentally significant area. The net environmental impacts of the proposal may not be negative. The environmental impact study must contain the following items:

(i) A description of the existing conditions of the existing site, adjacent properties, upstream and downstream creek sections for approximately 1,000 feet (unless conditions require additional information in the opinion of the director of public works), and creek and overbank areas. The description of these conditions must include:

(aa) the characterization of creek features such as bed quality and material, pool-riffle sequences, natural ground water, springs, seeps, magnitude and continuity of flow, water quality (including biological oxygen demand, dissolved oxygen, and nutrient loadings), bank quality and material, vegetative cover and patterns, bank erosion, topographic relief, disturbances to the natural character of the creek, animal and aquatic life, and the extent and character of wetland areas; and

(bb) soil types and land uses of the site and surrounding area.

(ii) A description of the proposed project. This description must include:

(aa) the intended ultimate use of the site, or if that is not known, a description of the interim site plan, including construction access, etc;

(bb) reasons why the creek or flood plain alteration is necessary; and

(cc) a site plan including the flood plain and all construction access necessary to perform the work.

(iii) A description of at least three possible ways of handling the creek and flood plain, including:

(aa) an alternative that assumes the creek and flood plain are left as is;

(bb) the applicant's desired course of action; and

(cc) an alternative considered but not chosen by the applicant, and any additional alternatives required by the director of public works.

(iv) An identification of the impacts created by each alternative, describing in detail all of the positive and negative impacts upon the existing conditions described in Subparagraph (i), that would be created by each alternative.

(v) A recommended course of action based on the alternatives.

(vi) Proposed strategies to mitigate adverse impacts. Example strategies include tree wells, temporary construction and permanent erosion and sedimentation controls, vegetative buffers, replacement planting, etc.

(F) The toe and fill slope must parallel the natural channel to prevent an unbalanced stream flow in the altered FP area.

(G) To insure maximum accessibility to the FP area for maintenance and other purposes and to lessen the probability of slope erosion during periods of high water, maximum slopes of the filled area shall not exceed three to one for 50 percent of the length of the fill and six to one for the remaining length of the fill. The slope of any excavated

area not in rock may not exceed four to one. Vertical walls, terracing, and other slope treatments may be considered provided no unbalancing of stream flow results and only as a part of a landscaping plan submission.

(H) The elevation of excavated areas in the FP area may not be lower than one-third of the depth of the natural channel, as measured from the adjacent bank, except for excavation of lakes. No excavation may be closer than 50 feet to the bank of the natural channel except as necessary to drain. The excavated area may not exceed 25 percent of the total area of the tract's unfilled flood plain.

(I) A landscape and erosion control plan must be submitted and approved. Landscaping must incorporate natural materials (earth, stone, wood) on cut and filled slopes wherever possible. The definitions of Section 51A-10.101 of this chapter apply to this subsection. Each landscape and erosion control plan must comply with the following criteria:

(i) The size, type, and location of all trees within the existing flood plain that are six-inch caliper and larger must be shown. The plans must indicate which of the trees are to be preserved and which will be lost due to development activities in the flood plain.

(ii) All trees greater than six-inch caliper in sloped areas of flood plain fill of four feet or less must be protected. If trees are protected by tree wells, the well must be at or beyond the dripline of the tree and must provide positive drainage. A well may not exceed four feet in depth unless designed and certified by a registered landscape architect. Tree wells are required if either of the following conditions occur at the base of a tree to be protected:

(aa) a fill of greater than six inches; or

(bb) a cut greater than six inches.

(iii) The size, type, and location of all proposed replacement trees to mitigate the loss of existing trees must be shown. The tree types must be approved by the department of park and recreation as suitable for use under local climate and soil conditions.

(iv) Where a swale is proposed, of the existing tees with a six-inch caliper or greater located within the proposed swale, the applicant must indicate replacement of either 35 percent, or the minimum number necessary to provide a spacing equivalent to 50 feet on center, whichever is less. At least 50 percent of the replacement trees must have a caliper no smaller than six inches. The remainder of the trees must have a caliper no smaller than three inches.

(v) The specific plant materials proposed to protect fill and excavated slopes must be indicated. Plant materials must be suitable for use under local climate and soil conditions. In general, hydroseeding or sodding bermuda grass is acceptable during the summer months (May 1 to August 30). Winter rye or fescue grass may be planted during times other than the summer months as a temporary measure until such time as the permanent planting can be made.

(vi) The proposed methods of erosion and sedimentation control such as hay bales, sedimentation basins, etc., to be used during construction must be shown in detail.

(vii) The fill case applicant, the current owners, and subsequent owners are responsible for maintaining the assuring survival of all planted material until the property is developed and a permanent maintenance plan of record is established. This responsibility must be reflected in the submitted plans or supporting documents.

(J) Any alteration of the FP area necessary to obtain removal of an FP prefix may not cause any additional expense in any current or projected public improvements.

(3) If the FP area is in the flood plain of the Trinity River, Elm Fork of Trinity River, West Fork of Trinity River, Five Mile Creek — Confluence to Bonnie View Road, or White Rock Creek — Confluence to Scyene Road, the regulatory floodways established by the Federal Emergency Management Agency, the following requirements must be met:

(A) Encroachment into the floodway is prohibited unless:

(i) a professional registered engineer certifies that encroachment will not result in any increase in the design flood elevation; and

(ii) the Federal Emergency Management Agency issues a conditional Letter of Map Revision.

(B) Compliance with the engineering requirements for filling contained in this section is required.

(C) Encroachment must not result in any increase in the elevation of the design flood within the Dallas Floodway Levee System. (Ord. Nos. 19455; 19786) (21299)

SEC. 51A-5.106. Setback from Natural Channel Required.

(a) For purposes of this section:

(1) NATURAL CHANNEL SETBACK LINE means that setback line described below located farther beyond the crest:

(A) That line formed by the intersection of the surface of the land and the vertical plane located a horizontal distance of 20 feet beyond the crest.

(B) That line formed by the intersection of the surface of the land beyond the crest and a plane passing

through the toe and extending upward and outward from the channel at the designated slope. For purposes of this paragraph, the designated slope is:

(i) four to one if the channel contains clay or shale soil; and

(ii) three to one in all other cases.

(2) CREST means that line at the top of the bank where the slope becomes less than four to one.

(3) TOE means that line at the bottom of the bank where the slope becomes less than four to one.

(b) Except as otherwise provided in Subsection (c), all structures must be located behind the natural channel setback line.

(c) A structurally engineered retention system approved by the director of public works may be substituted for the setback required in Subsection (b). (Ord. 19786)

AFFIDAVIT OF GREGORY A. COOK

THE STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, this day personally appeared Gregory A. Cook, who, being by me duly sworn, deposes and states the following are within his personal knowledge and are true and correct:

"My name is Gregory A. Cook. I am over the age of 18, of sound mind, capable of making this affidavit, have personal knowledge of the facts herein stated and am competent to testify to those facts.

"I am employed as a Drainage Inspector/Code Enforcement Official (Badge No. K1001) for the Department of Public Works of the City of Dallas. My primary function is inspecting for violations of Dallas City Codes.

"I went on the premises twice this year. On or about March 28, I drove out on the below described real property ("the premises"), which is a tract of approximately 133.426 acres located on the south side of the 3200 block of Stag Road in City Blocks 5836 and 6860 in the City of Dallas, Dallas County, Texas, the premises being further described in Exhibit A, which is attached to and made a part of this instrument for all purposes. About two-thirds of the premises is within the flood plain is as shown on a zoning map, which is attached to and made a part of this instrument as Exhibit B for all purposes.

"I met a man on the premises who identified himself as Lamar Neeley and I told him I was inspecting the drainage of the premises. Mr. Neeley told me that he was the owner. While so inspecting, I observed about five trucks dump dirt in the flood plain on the premises. I told Mr. Neeley to stop the dumping. He replied that the dumping was not occurring in the flood plain. I then left.

"On or about March 31, I drove my car onto the premises behind some trucks. I saw a heavy-set white gentleman who appeared to be about 60 years old. He was talking with some inspectors from the Water Department. During their conversation, I observed about 10 trucks dump fill in the flood plain. After their conversation was over, I went over to that gentleman. He identified himself as James Currey and said he had inherited the property. I issued him a notice of flood plain violation and then I left.

"I have caused an inspection of city records to be performed, and that inspection shows that there are no permits or other approvals that authorize the filling of a flood plain on the premises.

"Based on the foregoing, I believe that the person in control of the property is depositing and storing fill in a flood plain (FP) area without a permit in violation of Section 51A-5.105(a)(1) of the Dallas City Code."

Gregory A Cook

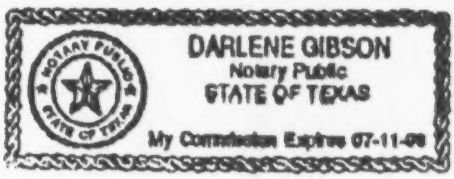
Affiant

SWORN and SUBSCRIBED before me by affiant on the 28th day of July, 1994.

My commission expires:
7-11-98

Darlene Gibson

Notary Public, State of Texas
Notary's printed name: Darlene Gibson



CITY OF DALLAS

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, ROBERT S. SLOAN, city secretary of the City of Dallas, Texas, do hereby certify that the attached is a true and correct copy of

Chapter 7A Section 19

of *The Revised Code of Civil and Criminal Ordinances of the City of Dallas* as it appears in the latest printing of the code on file in my office.

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, this the 29th day of July, 1994.

ROBERT S. SLOAN
City Secretary
City of Dallas, Texas

CITY OF DALLAS TEXAS

EXHIBIT
"C"

Anti-Litter Regulations

SEC. 7A-13. Distribution of handbills where posted or indicated as prohibited.

No person shall throw, deposit or distribute any commercial or noncommercial handbill upon any private premises, if requested by anyone thereon not to do so, or if there is placed on such premises in a conspicuous position near the entrance thereof, a sign bearing the words "No Trespassing," "No Peddlers or Agents," "No Advertisement," or any similar notice indicating in any manner that the occupants of such premises do not desire to be molested or have their right of privacy disturbed, or to have any such handbills left upon such premises. (Ord. 10371)

SEC. 7A-14. Manner of distribution of handbills to inhabited premises.

No person shall throw, deposit or distribute any commercial or noncommercial handbill in or upon private premises which are inhabited, except by handling or transmitting any such handbill directly to the owner, occupant or other person then present in or upon such private premises. In case of inhabited private premises which are not posted, as provided in this chapter, such person, unless requested by anyone upon such premises not to do so, may place or deposit any such handbill in or upon such inhabited private premises, if such handbill is so placed or deposited as to secure or prevent such handbill from being blown or drifted about such premises or sidewalks, streets or other public places and except that mailboxes may not be so used when so prohibited by federal postal law or regulations.

(a) *Exemption for mail and newspapers.* The provisions of this section shall not apply to the distribution of mail by the United States, nor to newspapers (as defined herein)

except, that newspapers shall be placed on private property in such manner as to prevent their being carried or deposited by the elements upon any street, sidewalk or other public place or upon private property. (Ord. 10371)

SEC. 7A-15. Dropping litter, etc., from aircraft prohibited.

No person in an aircraft shall throw out, drop or deposit within the city any litter, handbill or any other object. (Ord. 10371)

SEC. 7A-16. Posting of notices on poles, trees, structures, etc.

No person shall post or affix any notice, poster or other paper or device, calculated to attract the attention of the public, to any lamp post, public utility pole or shade tree, or upon any public structure or building, except as may be authorized or required by law. (Ord. 10371)

SEC. 7A-17. Throwing or depositing litter on private premises.

A person commits an offense if he throws or deposits litter on any occupied private premises within the city, whether owned by the person or not, or in or on any gutter, parkway, sidewalk, or alley adjacent to the private premises; except, that the owner, occupant, or person in control of private premises may maintain authorized private receptacles for collection in such a manner that litter will be prevented from being carried or deposited by the elements upon any street, gutter, parkway, sidewalk, alley, or other public place or upon any private premises. (Ord. Nos. 10371; 20599)

SEC. 7A-18. Duty to maintain premises free from litter.

An owner, occupant, or person in control of private premises commits an offense if he places, deposits, or throws; permits to accumulate; or permits or causes to be placed, deposited, or thrown, any litter on the premises or in or on any gutter or parkway adjacent to the premises or on one-half of that portion of an alley adjacent to the premises, unless the litter has been deposited in an authorized private receptacle for collection. (Ord. Nos. 10371; 13804; 20599)

SEC. 7A-19. Depositing litter on vacant lots prohibited.

A person commits an offense if he throws or deposits litter on any open or vacant private property within the city, whether owned by the person or not, or in or on any gutter, parkway, sidewalk, or alley adjacent to the private property. (Ord. Nos. 10371; 20599)

CITY OF DALLAS

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, ROBERT S. SLOAN, city secretary of the City of Dallas, Texas, do hereby certify that the attached is a true and correct copy of

Chapter 18 Section 10 (a) (1)

of *The Revised Code of Civil and Criminal Ordinances of the City of Dallas* as it appears in the latest printing of the code on file in my office.

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, this the 29th day of July, 1994.

ROBERT S. SLOAN
City Secretary
City of Dallas, Texas

CITY OF DALLAS TEXAS

EXHIBIT
"D"

Municipal Solid Wastes

TABLE OF MONTHLY CHARGES
(Front-end Loaders)

QUANTITY OF SOLID WASTE	NUMBER OF COLLECTIONS PER WEEK			
Dumpster Size	1	2	3	4
4 cubic yards	58.01	72.38	90.35	112.81
6 cubic yards	86.76	108.32	135.27	168.96
8 cubic yards	115.51	144.26	180.19	225.11
10 cubic yards	144.26	180.19	225.11	236.34

(4) Extraordinary collection and removal service: Cost plus 15 percent for materials not included in the regular collection service as described in Section 18-8.

(5) Miscellaneous collection service charges will be as follows:

(A) Public housing may be charged as apartments.

(B) Churches, clinics, hospitals, public buildings, and schools will be charged as commercial locations.

(6) The service charge for the collection and removal of grass cuttings from any premises as a special service is:

(A) $0.50 per bag, if the service is performed by city sanitation services; and

(B) an amount specified by city contract, if the service is performed by a contractor selected by the city under Section 18-8(b)(3).

(7) Packout or drive-in service for certain handicapped persons meeting uniform requirements specified by the director of sanitation will be provided at the rate for alley or curb collection service.

(8) Any applicant for a reduced rate under Subparagraph (7) of this subsection who intentionally makes any misrepresentation in any written statement required by such uniform requirements is guilty of an offense and, upon conviction, is punishable by a fine not to exceed $500.

(d) A person claiming entitlement to a refund of sanitation services paid to the city must notify the director of sanitation of the claim within 180 days from the date the disputed payment was received by the city. (Ord. Nos. 16367; 16435; 16697; 17133; 17545; 17987; 19300; 19409; 19963; 19991; 20736; 21058; 21431; 21632; 21819)

Sec. 18-10. Regulating the processing and disposal of solid waste materials.

(a) General regulations:

(1) A person commits an offense if he disposes of dry or wet solid waste or other waste materials inside the city, other than at a location and in a manner approved by the director of sanitation as complying with state and local law regulating solid waste processing and disposal. The owner, occupant, or person in control of premises to which illegally-deposited solid waste is traced is presumed to have illegally disposed of or caused the illegal disposal of the solid waste. If a vehicle is used to illegally dispose of solid waste, the owner of the vehicle is presumed to have illegally disposed of or authorized the illegal disposal of the solid waste. Proof of ownership of a vehicle may be made by a computer-generated record of the registration of the vehicle with the State Department of Highways and Public Transportation showing the name of the person to whom state license plates were issued. This proof is prima facie evidence of the ownership of the vehicle by the person to whom the certificate of registration was issued.

(2) The director of sanitation shall be responsible for determining disposal procedures, authorized users, and methods of operation at municipal transfer stations and landfill sites inside the city.

(3) The director of sanitation shall have authority to approve the establishment and make inspections of non-municipal landfill sites inside the city to insure compliance with state and local law regulating the establishment and operation of landfill sites.

(b) Processing and disposal of solid waste materials by private persons, firms, or corporations shall be permitted only after application has been made to the director of sanitation as complying with all applicable city, county, and state regulations pertaining to solid waste processing and disposal operations.

CITY OF DALLAS

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, ROBERT S. SLOAN, city secretary of the City of Dallas, Texas, do hereby certify that the attached is a true and correct copy of

Chapter 18 Section 12 (b)

of *The Revised Code of Civil and Criminal Ordinances of the City of Dallas* as it appears in the latest printing of the code on file in my office.

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, this the 29th day of July, 1994.

ROBERT S. SLOAN
City Secretary
City of Dallas, Texas

Municipal Solid Wastes

(b) An owner, occupant, or person in control of private premises commits an offense if he places, deposits, or throws; permits to accumulate; or permits or causes to be placed, deposited, or thrown, solid waste material on those premises, unless the solid waste material has been deposited in an authorized private receptacle for collection.

(c) *City authorized to collect and remove solid waste materials:* Upon the failure of the owner, occupant, or person in control of private premises to comply with Subsection (b) of this section, or upon the written request and authorization of the owner after notification under Subsection (d) of this section, or upon a determination by the city health officer that the conditions constitute an immediate health hazard, the director shall have the solid waste materials collected and removed from the premises.

(d) *Notice to remove:*

(1) Before removing illegally-deposited solid waste material from private premises, the director must notify the owner of the premises to remove the solid waste material within 10 days. This notice must be in writing and may be served by handing it to the owner in person or by United States regular mail, five-day return receipt requested, addressed to the owner at the owner's post office address as shown on the tax rolls of the city or of the county in which the premises are located. If the owner cannot be found and the letter is returned by the United States Postal Service, then the owner may be notified by:

(A) publication two times within 10 consecutive days in the official newspaper adopted by the city council;

(B) posting the notice on or near the front door of each building on the premises to which the violation relates; or

(C) posting the notice on a placard attached to a stake driven into the ground on the premises to which the violation relates, if the premises contain no buildings.

(2) Notice under this subsection is not necessary when the solid waste material is determined by the director of public health to be an immediate health hazard.

(e) *Charge to be levied and collected by the city for solid waste material collection and removal:* If the city collects and removes solid waste materials from private premises at the request of the owner or upon failure of the owner to comply with the notice required under Subsection (d) of this section, charges in the amount of the total actual costs incurred by the city in performing the work shall be collected from the owner or levied, assessed, and collected against the premises on which the work is performed. The charges shall be collected by the director of revenue and taxation of the city. The director of revenue and taxation shall file a statement by the director with the county clerk of Dallas County, Texas setting out the total actual costs incurred by the city, as required by state law, and the city shall perfect a privileged lien on the premises involved, second only to tax liens and liens for street improvements, in the amount of the actual costs incurred, together with 10 percent interest on that amount from the date the costs were incurred. The city may file a suit in an appropriate court of law to foreclose upon its lien and recover its actual costs incurred plus interest. The suit must be filed in the name of the city. The statement filed under this subsection, or a certified copy of the statement, shall be prima facie proof of the amount of actual costs incurred by the city.

(f) The director may issue citations and prosecute persons for violating Subsection (b) regardless of whether a notice is issued under this section. (Ord. Nos. 16367; 17226; 19963; 20599; 21025)

SEC. 18-12.1. PENALTIES FOR VIOLATION.

(a) A person who violates a provision of this article, or who fails to perform a duty required of him by this article, commits an offense. A person is guilty of a separate offense for each day or part of a day during which the violation is committed, continued, or permitted.

(b) An offense under this article is punishable by a fine of not more than $2,000 nor less than:

(1) $50 for a first conviction of any violation of this article except Section 18-4(e), 18-5(c), 18-8(b)(1), 18-12(b), or 18-10;

(2) $75 for a first conviction of a violation of Section 18-4(e);

(3) $100 for a first conviction of a violation of Section 18-5(c), 18-8(b)(1), or 18-12(b); and

AFFIDAVIT OF ELVEN PETERSON

THE STATE OF TEXAS
COUNTY OF DALLAS } ss.:

BEFORE ME, the undersigned authority, this day personally appeared Elven Peterson, who, being by me duly sworn, deposes and states the following are within his personal knowledge and are true and correct:

"My name is Elven Peterson. I am over the age of 18, of sound mind, capable of making this affidavit, have personal knowledge of the facts herein stated and am competent to testify to those facts.

"I am employed as a Code Enforcement Inspector (Badge No. N1135) for the Department of Streets, Sanitation, and Code Enforcement of the City of Dallas. My primary function is inspecting for violations of Dallas City Codes.

"I have caused to be reviewed and searched the deed records of Dallas County, and the deed records indicate James C. Currey to be the owner of a tract ("the premises") of approximately 133.426 acres located at the dead end in the 5000 Block of Wadsworth Drive in City Block Nos. 5836 and 6860 in the City of Dallas, Dallas County, Texas, the premises being further described in Exhibit A (a legal description of the suspected premises) and Exhibit B (a map of the suspected premises), which are attached to and made a part of this instrument for all purposes. In the event of a conflict between the exhibits, Exhibit B controls.

"At approximately 11:15 a.m. on July 22, 1994, I was driving westbound on East Ledbetter Drive. I observed

two 18-wheelers loaded with construction debris proceeding in the direction of the premises. I followed them. The trucks turned south onto Wadsworth Drive, and proceeded to the dead-end, which is where the entrance to the premises is. They entered the premises. I called Artie McDaniel (Badge No. N1137) to join me, which he did. We waited at the dead-end for them to return. While we waited, five 12-yard dump trucks loaded with salvaged shingles and lumber drove up. They left after we warned them that they could receive a citation for illegal dumping if they proceeded onto the property and exited with empty truck beds.

"When the person in control of the property realized that we were warning persons not to dump materials on the premises, he came out to talk with us. He identified himself as Lamar Nealy and said he owned the property. He denied that there was any illegal dumping occurring on the premises. He then screamed at us "to get off his property." We insisted we were on a public street. He became so abusive that we called the police. While waiting for the police, eight more trucks loaded with building materials and asphalt shingles arrived at the entrance to the premises, but they left when they saw us. When the police arrived about five minutes later, they told him that we could remain where we were. While the police were there, approximately six more trucks arrived. Four of them were loaded with building materials, and they left when they saw us. The other two trucks were loaded with dirt and they proceeded onto the property. We and the police subsequently left.

"At approximately 6:30 a.m. on July 28, 1994, I returned to the entrance of the premises. The gate to the

premises was locked, but there were seven 12-yard trucks loaded with asphalt shingles waiting to enter the premises. I told the truck drivers that they would receive a citation if they entered the property and returned with empty truck beds. I then called Mr. McDaniel to join me. All seven trucks left. I followed four of them to the McCommas landfill. When I returned to the premises, I observed three more 12-yard trucks loaded with asphalt shingles waiting to enter the premises and Mr. Nealy was at the gate. I warned these drivers about the possibility of receiving a citation. Mr. Nealy then called them to enter, which they did. The drivers left fully loaded about fifteen minutes after they entered. Mr. McDaniel then joined me at 7:20. Subsequently, eight more trucks showed up loaded with asphalt shingles, but Mr. Nealy would not let them enter. He then locked the gate and left. We left about 8:10. We returned at about 9:05, and the gate was open. After waiting for a few minutes, we left.

"I have caused an inspection of city records to be performed, and that inspection shows that there are no permits or other approvals that authorize on the premises: (1) the deposit of litter, (2) the disposal of solid waste materials, (3) the placement of solid waste material, or (4) the operation of a sanitary landfill.

"I have personally investigated and believe the following violations of the Dallas City Code exist at the premises:

1. Permitting to accumulate litter on the premises that is not in an authorized private receptacle for collection in violation of Section 7A-18 of the Dallas City Code.

2. Disposing of dry solid waste materials inside the City, other than at a location and in a manner approved by the director of streets, sanitation, and code enforcement, in violation of Section 18-10(a)(1) of the Dallas City Code.

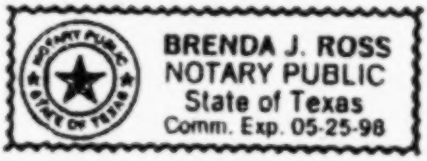
3. Permitting to accumulate solid waste materials on the premises in violation of Section 18-12(b) of the Dallas City Code.

4. Using land located in the City for other than those uses permitted designated as permitted uses in accordance with Chapter 51A of the Dallas City Code in violation of Sections 51A-1.103(a)(3) and 51A-4.212(9) of that code."

Elvan Peterson

Affiant

SWORN and SUBSCRIBED before me by affiant on the 29th day of July, 1994.



My commission expires:
5-25-98

Brenda J. Ross

Notary Public, State of Texas
Notary's printed name:

Exhibit A

PROPERTY DESCRIPTION
OF JAMES C. CURREY TRACT
(Loop 12, West of M.K. & T. Railroad)

BEING a tract of land in City Blocks 5836 and 6860 in the George L. Haas Survey, Abstract No. 641, in the City of Dallas, Dallas County, Texas, and being more particularly described as follows:

BEGINNING at the intersection of the southeast line of State Highway Loop 12 and the westernmost right-of-way line of a 120 foot wide D.P. & L. Company easement, said easement being adjacent to the M.K. & T. Railroad right-of-way;

THENCE in a southeasterly direction along said D.P. & L. Company right-of-way, a distance of approximately 2,997 feet to a point for corner on the common line between City Blocks 6860 and 6865;

THENCE in a southwesterly direction along said common block line, a distance of approximately 2,030 feet to a point for corner on the common line between City Blocks 6860 and 6859;

THENCE in a northwesterly direction along said common block line, a distance of approximately 2,627 feet to a point for corner on the southeast line of Stag Road;

THENCE in a northeasterly direction along the southeast line of Stag Road, a distance of approximately 575 feet to a point for corner on a line, said line being the southeastward prolongation of the centerline of Cranfill Drive;

THENCE in a southeasterly direction along said line, a distance of approximately 250 feet to a point for corner on a

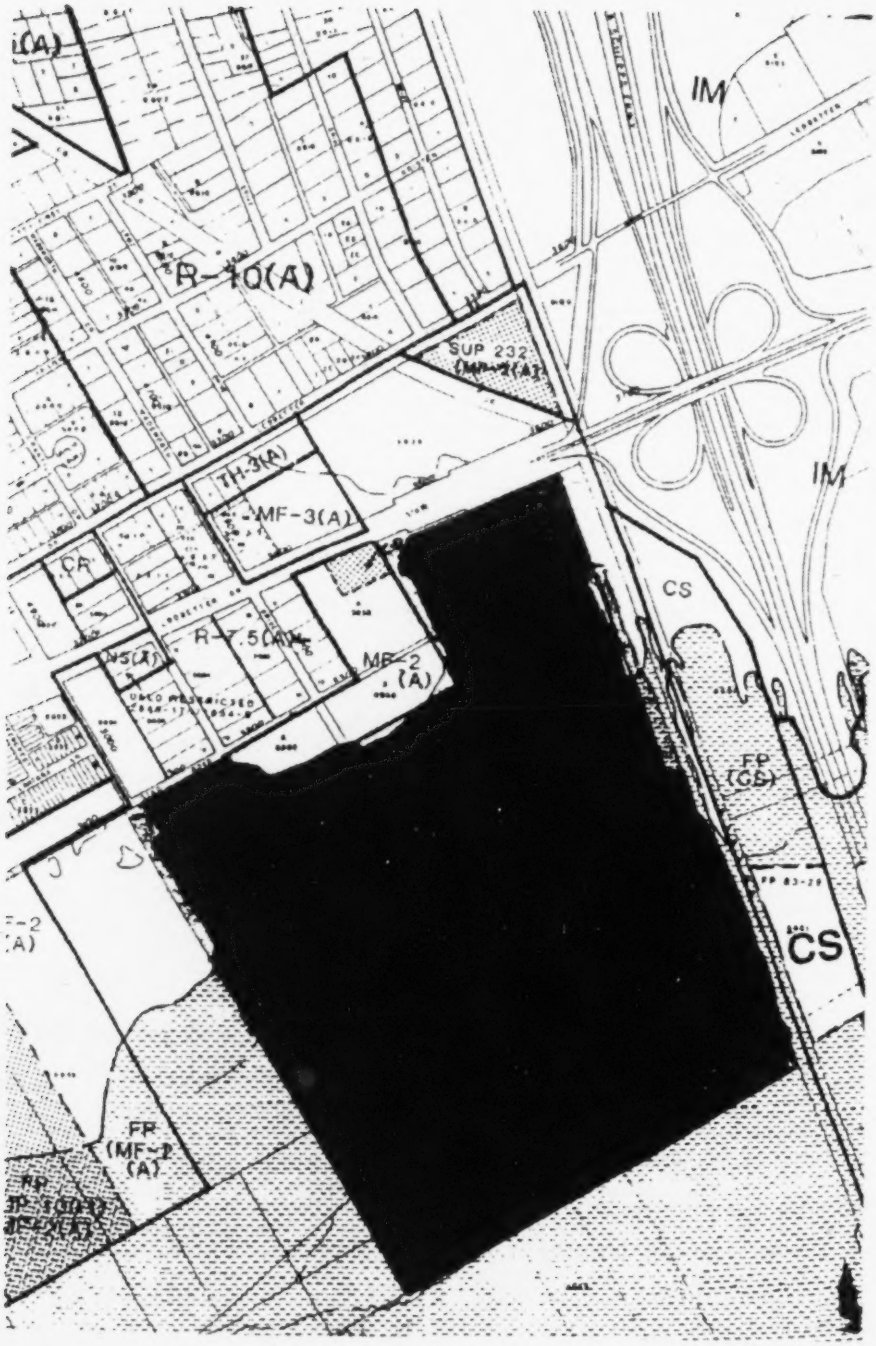
line, said line being approximately 250 feet southeast of and parallel to the southeast line of Stag Road;

THENCE in a northeasterly direction along said line, a distance of approximately 1,150 feet to a point for corner on a line, said line being the southeastward prolongation of the common line between City Blocks A/6860 and 6860;

THENCE in a northwesterly direction along said line and its northwestward prolongation, a distance of approximately 800 feet to a point for corner on the southeast line of State Highway Loop 12;

THENCE in a northeasterly direction along the southeast line of State Highway Loop 12, a distance of approximately 923.69 feet to the POINT OF BEGINNING, and containing approximately 133.426 acres of land, more or less.

Exhibit B



NO. 94-07642

CITY OF DALLAS, TEXAS, Plaintiff, VS. JAMES C. CURREY, Defendant,	IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION AND PRAYER FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the City of Dallas, hereinafter referred to as Plaintiff, complaining of James C. Currey, hereinafter referred to as Defendant, and for cause of action would respectfully show unto the court the following:

I.

The City of Dallas is a home-rule municipal corporation situated in Dallas County, Texas, incorporated and operating under the laws of the State of Texas.

II.

James C. Currey is an individual and is the owner of a tract of approximately 133.426 acres located on the south side of the 3200 block of Stag Road, and at the dead end in the 5000 block of Wadsworth Drive, being City Blocks 5835 and 6860, in the City of Dallas, Dallas County, Texas. Service of Process may be made upon Defendant by serving the defendant at 5400 Surrey Circle, Dallas, Dallas County, Texas.

III.

The property in question is located in the County of Dallas, Texas. Approximately two-thirds of the property is located within a Flood Plain of a Five Mile Creek, in an area defined under the Dallas City Code as "undesignated Flood Plain."

IV.

Section 51A-5.105 of the Dallas City Code entitled "FILLING IN THE FLOODPLAIN" expressly mandates in (a)(1) that:

> A person shall not deposit or store fill, place a structure or excavate in a FP area until he has obtained from the Director of Public Works a fill permit allowing the property to be developed at a specified elevation in compliance with this section, and he obtains all required state and federal permits.

A certified copy of Section 51A-5.105 of the Dallas City Code is attached hereto and incorporated herein as Plaintiff's Exhibit A.

V.

Defendant has deposited or has allowed to be deposited illegal fill material on the property without a permit. To date, many dump truck loads of fill dirt have been deposited and stored illegally without a permit. Such illegal fill creates an obstruction and blockage of the Five Mile Creek Flood Plain, posing an imminent threat to the safety and welfare of the surrounding community.

VI.

Defendant has been informed by representatives of the City of Dallas that such illegal fill constitutes a violation of the Dallas City Code and presents a safety hazard. Specifically, on March 28, 1994, an employee of the Dallas Public Works Department observed dump trucks filling in flood plain, and informed Defendant that such action in filling the Flood Plain were illegal.

Again, on March 29 or 30, 1994, the same employee observed trucks filling in flood plain, and issued a notice of violation to the individual who represented himself to be the owner of the property. Defendant has willfully and intentionally continued to violate the Dallas City Code, as described herein, to the present time. It is for these reasons that Plaintiff requests that a Temporary Restraining Order and a Temporary Injunction be issued against Defendant. The affidavit attesting to these facts is attached to the petition as Plaintiff's Exhibit B.

VII.

Section 7A-19 of the Dallas City Code entitled "DUTY TO MAINTAIN PREMISES FREE FROM LITTER" expressly mandates that:

> An owner, occupant, or person in control of private premises commits an offense if he places, deposits, or throws; permits to accumulate; or permits or causes to be placed, deposited, or thrown, any litter on the premises or in or on any gutter or parkway adjacent to the premises or on one-half of that portion of an alley adjacent to the premises, unless the litter has been deposited in an authorized private receptacle for collection.

A certified copy of Section 7A-19 of the Dallas City Code is attached hereto and incorporated herein as Plaintiff's Exhibit C.

VIII.

Section 18-10(a)(1) of the Dallas City Code entitled "REGULATING THE PROCESSING AND DISPOSAL OF SOLD WASTE MATERIALS" expressly mandates, in relevant part, that:

> A person commits an offense if he disposes of dry or wet solid waste or other waste materials inside the city, other than at a location and in a manner approved by the director of sanitation as complying with state and local law regulating solid waste processing and disposal.

A certified copy of Section 18-10(a)(1) of the Dallas City Code is attached hereto and incorporated herein as Plaintiff's Exhibit D.

IX.

Section 18-12(b) of the Dallas City Code, entitled "REGULATING THE COLLECTION AND REMOVAL OF ILLEGALLY DUMPED SOLID WASTE MATERIALS ON PRIVATE PREMISES," expressly mandates, in relevant part, that:

> An owner, occupant, or person in control of private premises commits an offense if he places, deposits, or throws; permits to accumulate; or permits or causes to be placed, deposited, or thrown, solid waste material on those premises, unless the solid waste material has been deposited in an authorized private receptacle for collection.

A certified copy of Section 18-12(b) of the Dallas City Code is attached hereto and incorporated herein as Plaintiff's Exhibit 3.

X.

Defendant has deposited, permitted to be deposited, and permitted to accumulate, litter on the premises owned and controlled by defendant, but not in an authorized private receptacle for collection. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community. Defendant has also disposed of dry solid waste materials other than at a location and in a manner approved by the Director of Streets, Sanitation, and Code Enforcement. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community. Defendant has also deposited, permitted to be deposited, and permitted to accumulate, solid waste materials on the premises owned and controlled by defendant. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community.

XI.

Defendant has been informed by representatives of the City of Dallas that such illegal dumping constitutes a violation of the Dallas City Code and presents a safety hazard. Specifically, on July 22, 1994, an employee of the Dallas Department of Streets, Sanitation, and Code Enforcement observed tractor-trailers loaded with construction debris entering the premises. Other trucks loaded with debris for disposal attempted to enter the property for the purpose of dumping, but were warned that such dumping was illegal, causing such trucks to leave. Such activities have been observed on July 28, 1994, as well. Employees of the City of Dallas have informed Defendant that such dumping is ille-

gal. Because of the unwillingness of the Defendant to cease such illegal dumping operations, Plaintiff requests that a Temporary Restraining Order and a Temporary Injunction be issued against Defendant. The affidavit attesting to these facts is attached to the petition as Plaintiff's Exhibit F.

XII.

Section 211.012 of the Local Government Code allows a municipality to obtain an injunction against violations of a zoning ordinance without proving that Defendant's use of the property in question constitutes a threat to the public health, safety or welfare.

XIII.

Section 54.016 of the Texas Local Government Code allows a municipality to obtain an injunction against violations of an ordinance upon showing of substantial danger or injury or an adverse health impact to any person or to the property of any person other than the Defendant. It is not necessary for the municipality to prove no adequate remedy at law exists. Nor is it necessary for the municipality to show that a criminal prosecution has occurred or has been attempted. Chapter 54 applies because the Flood Plain ordinance involved relates to zoning that provides for the use of land.

XIV.

Pursuant to Section 54.013 of the Local Government Code, venue for an action under Chapter 54 is in the county in which the municipality is located. Accordingly, venue for this matter properly lies in Dallas County.

XV.

Unless this court immediately enjoins the activity of the Defendant, Plaintiff and its citizens will suffer irreparable injury. Through the actions of Defendant, there has been a blockage and obstruction of the Five Mile Creek Flood Plain. There has also been an accumulation of litter, debris, and other solid waste on the tract in question. Defendant is continuing to violate the Dallas City Code in a manner which jeopardizes the health and safety of the persons in the community as well as posing a serious risk of substantial property damage and destruction. Defendant is the lawful owner of the property and, although aware of the illegal activities, has been unwilling to correct or remedy the situation.

XVI.

Defendant's willful and continuing violation of the ordinances of the City of Dallas has left Plaintiff without an adequate remedy at law. Unless this court immediately enjoins the violations of the Defendant, there exists an immediate danger that the health, safety and property of the citizens of Dallas will be permanently damaged.

XVII.

Plaintiff prays that upon notice and hearing, this Honorable Court issue a temporary injunction ordering Defendant to remove all unauthorized and illegal fill material deposited and stored on his property along the Five Mile Creek Flood Plain. Plaintiff further prays that upon final trial on the merits, this Honorable Court issue a permanent injunction enjoining Defendant from illegally depositing and storing fill material on the property, and that this court order Defendant to remove all unauthorized and illegal fill deposited and

stored on the property before the expiration of ninety (90) days from the entry of final judgment. In the alternative, Plaintiff prays that this Honorable Court permit Plaintiff to remove all unauthorized and illegal fill material from the property at the sole cost and expense of the Defendant, should Defendant not do so before the expiration of ninety (90) days, and that this court issue appropriate orders for the collection of said costs and expenses by Plaintiff from Defendant.

XVIII.

Section 54.017 of the Local Government Code permits a municipality to recover a civil penalty in an amount not to exceed $1,000 per day for a violation of a City of Dallas ordinance. Pursuant to this authority, the City of Dallas requests the court impose a civil penalty for each day of the continuous violations of the Dallas City Code since the date Defendant received notice of the violations.

WHEREFORE, PREMISES CONSIDERED, the City of Dallas prays for the following relief:

1. That a temporary restraining order be issued immediately, enjoining Defendant from storing illegal fill material on the property, within the floodplain, without a permit, and enjoining Defendant from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property;

2. That a temporary injunction be issued enjoining Defendant from depositing and storing illegal fill material on the property without a permit, enjoining Defendant from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property, ordering the removal of all unauthorized and illegal fill material now stored on the property, and ordering the removal of all

illegally deposited solid waste material now deposited on the property;

3. That a permanent injunction be issued enjoining Defendant from depositing and storing illegal fill material on the property without a permit, enjoining Defendant from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property, ordering the removal of all unauthorized and illegal fill material now stored on the property, and ordering the removal of all illegally deposited solid waste material now deposited on the property before the expiration of ninety (90) days from the entry of final judgment in this cause;

4. In the alternative, should Defendant fail to remove all unauthorized and illegal fill material and illegal solid waste material before the expiration of said ninety (90) days, that Plaintiff, City of Dallas, be allowed to remove all unauthorized and illegal fill material and solid waste material deposited and stored on the property at the sole cost and expense of Defendant, and appropriate orders for collection of said costs and expenses by Plaintiff from Defendant to be issued concurrently with the permanent injunction;

5. That the court impose a civil penalty against Defendant for each day of continuous violations of the Dallas City Code since the date Defendant received notice of the violations; and

6. That Plaintiff recover its costs incurred including attorney's fees, and for such other and further relief, general or special, at law or in equity, to which this Plaintiff may show itself justly entitled.

Respectfully submitted,

OFFICE OF THE
CITY ATTORNEY
CITY OF DALLAS, TEXAS
1500 Marilla Street, 7BN
Dallas, Texas 75201
(214)670-3510
Telecopier - (214)670-3515

By

RONALD D. STUTES
Assistant City Attorney
State Bar of Texas
No. 19452600

WALTER C. DAVIS, III
Assistant City Attorney
State Bar of Texas
No. 05568500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Second Amended Original Petition and Prayer For Temporary Restraining Order and Temporary and Permanent Injunction was served, via certified mail, return receipt requested, to Plaintiff's attorney of record, Jeffrey Cook, on the 9th day of August, 1994.

RONALD D. STUTES

VERIFICATION

STATE OF TEXAS
COUNTY OF DALLAS } ss.:

BEFORE ME, the undersigned authority, on this day personally appeared Elven Peterson, who, being by me duly sworn, deposes and states the following are within his personal knowledge and are true and correct.

"My name is Elven Peterson. I am over the age of 18, of sound mind, capable of swearing to this document, have personal knowledge of the facts stated as to the statements and facts concerning allegations of illegal disposal of solid waste and illegal dumping contained in this Plaintiff's Original, First and Second Amended Petitions; all such statements are true and correct."

ELVEN PETERSON

SUBSCRIBED AND SWORN TO BEFORE ME on this 9th day of August, 1994, to certify which witness my hand and official seal.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

VERIFICATION

STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared Gregory Cook, who, being by me duly sworn, deposes and states the following are within his personal knowledge and are true and correct.

"My name is Gregory Cook. I am over the age of 18, of sound mind, capable of swearing to this document, have personal knowledge of the facts stated as to the statement and facts concerning the flood plain allegations contained in Plaintiff's Original, First and Second Amended Petitions; all such statements are true and correct."

Gregory Cook

GREGORY COOK

SUBSCRIBED AND SWORN TO BEFORE ME on this the 9th day of August, 1994, to certify which witness my hand and official seal.

DEBORAH ANDRIES
COMMISSION EXPIRES
AUGUST 29, 1995

Mary Donaldson

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

Cause No. 94-07642

CITY OF DALLAS, **Plaintiff,** **vs.** **JAMES C. CURREY,** **Defendant.**	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS [Clerk Seal illegible] 192ND DISTRICT COURT

DEFENDANT'S ORIGINAL, ANSWER, COUNTERCLAIM AND RULE 13 MOTION

James C. Currey, Defendant and Counterplaintiff herein, files this Original Answer and Counterclaim and shows the Court as follows:

I. Original Answer

1. Defendant denies the allegations in Plaintiff's Original Petition and Prayer for Temporary Restraining Order and Temporary and Permanent Injunction and Plaintiff's First Amended Original Petition and Prayer for Temporary Restraining Order and Temporary and Permanent Injunction.

2. Defendant pleads the affirmative defenses of estoppel, waiver, illegality, laches, statute of limitation and offset.

II. Counterclaim

A. Discharge of Effluent onto the Property

1. The City of Dallas ("the City") has sued Mr. Currey in this case, and sought injunctive relief, based on the ridiculous premise that putting fill dirt on his own property being 142.9851 acres, more or less, on the south side of

Loop 12 near its diamond interchange with Interstate Highway 45 and an additional tract opposite it on the north side of Loop 12, together and including most of City Block 6860, and additionally much of City Block 5836, all lying within the City of Dallas, Dallas County, Texas ("the Property") creates an unsafe or hazardous condition.

2. At the same time that the City is making the baseless contentions in this suit, the City has knowingly and unlawfully permitted and continues to permit the discharge of effluent from its sanitary sewer onto City Block 6860 in a manner dangerous to human health, with an extremely high (4,600/ml.) coliform level "very likely to cause serious illness". Mr. Currey has repeatedly requested, as has Texas Utilities, that the City repair the sewer and maintain it as agreed to in the easement. Further, Mr. Currey has requested the City to provide the necessary pumps which were supposed to be installed and which are designated on the City's records but which have never been placed or are nonfunctioning.

3. As a direct and proximate result of the City's actions, Mr. Currey has suffered damages which exceed the minimum jurisdictional limits of this Court.

4. Unless enjoined, the City will continue to discharge effluent from its sanitary sewer and Mr. Currey will continue to suffer damages to the property for which there is no adequate remedy at law.

B. Unlawful Concentration and Diversion of the Natural Flow of Surface Waters

1. The City has unlawfully concentrated, impounded, and diverted the natural flow of surface waters in a manner that has damaged and continues to damage Mr. Currey's property in violation both of the common law and of Article 7589a of Vernon's Texas Civil Statutes which provide that it shall be unlawful for any person, including

municipal corporations to divert the natural flow of surface waters in such manner as to damage the property of another, and that in all such cases the injured party shall have remedies both at law and in equity.

2. As a direct and proximate result of the City's actions, Mr. Currey has suffered damages which exceed the minimum jurisdictional limits of this Court.

3. Unless enjoined, the City will continue to divert surface waters onto Mr. Currey's property. As a proximate result of such concentration and diversion, Mr. Currey will continue to suffer damages to the property for which there is no adequate remedy at law.

C. Trespassing

1. Mr. Currey incorporates the allegations and information contained herein by reference.

2. The City and a small army of its employees and agents; namely Gregory A. Vanhook, Chris Bowers, Patsy Quested, Elven Peterson, Artie McDaniel, John Dale, Gregory Cook, and at least seven others characterized as health department employees, policemen, health employees, or witnesses, armed on July 29, 1994, with an illegitimate and faulty search warrant, assembled at a country club and trespassed on Mr. Currey's property, as many of them had trespassed on earlier occasions and have admitted in their depositions. The City's sole purpose for trespassing on Mr. Currey's property is to harass him in retaliation for his litigation with the City.

3. As a direct and proximate result of the City's actions, Mr. Currey has suffered damages which exceed the minimum jurisdictional limits of this Court.

4. Unless enjoined, the City will continue to trespass and harass Mr. Currey and he will continue to suffer damages for which there is no adequate remedy at law.

D. Unconstitutional Taking of Private Property

1. Mr. Currey incorporates the allegations and information contained herein by reference.

2. Mr. Currey would show that the City has taken his property.

3. The Texas Constitution, Article I, Section 17, states: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . ." and, in Section 29, ". . . we declare that everything in this Bill of Rights' is excepted out of the general powers of government . . .", which exception would include the undefined so called "police power". The United States Constitution, in Article V of its Bill of Rights, similarly states, ". . . nor shall private property be taken for public use, without just compensation."

4. The property is not subject to flood. The City wrongly refuses to permit any kind of normal urban development on almost all of Mr. Currey's property in City Block 6860. This includes the building of a home or even the substantial improvement of any existing home on land that has been summarily designated as "flood plain" although, in truth and in fact, there is no evidence, record, or recollection by anyone that any part of the tract is subject to flood. Therefore, the City has unlawfully denied Mr. Currey any economically viable use of the land and continues to do so in a confiscatory manner.

5. The City has made public, reproduced, and widely distributed maps which indicate that the property would, under extreme conditions, be subject to flood. The City's only data to support that conclusion was commissioned by the City for its own purposes and prepared more than twenty years ago. The data is admittedly based on suppositions

which were not then and have never been true, and it is therefore false, misleading, and currently meaningless. During the intervening twenty years, Five Mile Creek, the principal watercourse in the area, has been entirely rerouted along a more southerly course, remote from Mr. Currey's property. The City has issued bonds and has spent millions of tax dollars purportedly to improve flows and drainage along the creek and to eliminate any propensity to flood, if indeed there has even been any such propensity on or near Mr. Currey's property.

6. The character of the governmental action in this case is not rational, impacts the public health and safety adversely, if at all, and effectively ousts Mr. Currey from the property in a way that has been customarily achieved through eminent domain proceedings.

7. Any ordinance of a municipal corporation which permanently so restricts the use of private property that it cannot be used for any reasonable urban purpose goes plainly beyond regulation and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of paying taxes while confiscation would relieve the owner of that burden.

8. The Texas Constitution, Article I, Section 17, further states that, when property is taken, ". . . compensation shall be first made or secured by a deposit of money." The last significant sale of a portion of City Block 6860 was in 1969, for apartments, at a price of $20,000 per acre.

9. As a direct and proximate result of the City's actions, Mr. Currey has suffered damages which exceed the minimum jurisdictional limits of this Court.

E. Improper and Unlawful Approval of a Plat or Subdivision

1. Mr. Currey incorporates the allegations and information contained herein by reference.

2. Mr. Currey would further show that the City illegally and improperly approved of a plat subdivision which necessarily results in the concentration and diversion of surface waters from their natural course so as to damage Mr. Currey's property.

3. The City has approved the construction and illegal placement on the property of two elements in City Block 6860, designed to concentrate and divert surface water and to discharge it furtively on said property. There is a culvert, hidden in brush and an open trough, also hidden. The City approved each of these and they appear on the City's records adjacent to "421Q-2111", despite the absence of any easement or other legal basis for their existence.

4. The City required the builder of an apartment complex to construct a box culvert under the apartments. As a result, surface water is concentrated, diverted, and discharged onto the property in City Block 5836, causing substantial erosion and damages. The culvert also appears on the records of the City and is unlawful and dangerous to public safety.

5. The City approved the construction of two culverts on Dallas Independent School District property at Maceo Smith Regional High School in each of which surface waters are concentrated, diverted, and then surreptitiously discharged into groves of trees, draining eastward onto the property, although continuation of the storm sewers a short distance, at a modest additional cost, would have delivered the water into an established creek channel.

6. The City has constructed massive culverts at Bonnie View Road which have diverted massive amounts of water from a previously insignificant branch which crosses Loop 12 flowing southerly. This has resulted in serious injury to a property owner and a substantial judgment against the City for its conduct.

7. As a direct and proximate result of the City's actions, Mr. Currey has suffered damages which exceed the minimum jurisdictional limits of this Court.

III. Attorney's Fees

1. It was necessary for Mr. Currey to secure the services of Jeffrey Cook, of Sullivan, Parker & Cook, a licensed attorney, to prepare and defend this case. Mr. Currey would show that he is entitled to recover reasonable and necessary attorney's fees.

IV. Rule 13 Motion

1. Plaintiff's Original Petition and Prayer for Temporary Restraining Order was filed in this case on August 1, 1994 against Lamar Nealy, Defendant, alleging that he was the owner of the property in question. Mr. Currey and his attorneys were advised that a Temporary Restraining Order was being sought against Mr. Currey on August 1, 1994. Mr. Currey and his attorneys appeared in Court to prevent the entry of the Temporary Restraining Order and discovered that the lawsuit was filed against the wrong party in violation of Rule 13. At the time the suit was filed, the City had affidavits from two of its employees reflecting that Mr. Currey owned the property. Defendant requests that the City be sanctioned for filing the Plaintiff's Original Petition in violation of Rule 13.

WHEREFORE, Mr. Currey prays that upon notice and hearing, this Court issue a temporary injunction enjoining the City from continuing its unlawful concentration and diversion of the natural flow of surface waters, discharging effluent from its sanitary sewer onto the property and that this Court order the City to repair and maintain the sanitary sewer, and from trespassing on the property; that a permanent injunction be issued enjoining the City from continuing its unlawful concentration and diversion of the natural flow of surface waters, discharging effluent from its sanitary sewer onto the property and that this Court order the City to repair and maintain the sanitary sewer, and from trespassing on the property; that the City be sanctioned pursuant to his Rule 13 Motion; and that Mr. Currey recover his actual damages, together with prejudgment and postjudgment interest, attorney's fees, court costs and such other and further relief to which he may be entitled.

Respectfully submitted,
SULLIVAN, PARKER & COOK

Jeffrey Cook
State Bar No. 04734495
2911 Turtle Creek Blvd.
Suite 1000
Dallas, Texas 75219
(214) 520-7494
ATTORNEYS FOR JAMES C. CURREY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been sent via facsimile to opposing counsel on this 10th day of August, 1994.

Jeffrey Cook

Appendix H

DEPOSIT FOR COSTS NOT COMPLIED WITH

CITY OF DALLAS, Plaintiff, vs. JAMES CURREY and FLOWERDALE LLC, Defendant, vs. LAMAR NEALY, Intervenor.	Cause No. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION AND PRAYER FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the City of Dallas, hereinafter referred to as Plaintiff, complaining of James C. Currey and Flowerdale LLC, hereinafter referred to as Defendants, and for cause of action would respectfully show unto the court the following:

I.

The City of Dallas is a home-rule municipal corporation situated in Dallas County, Texas, incorporated and operating under the laws of the State of Texas.

II.

James C. Currey is an individual and is, or was during relevant time periods, the owner of a tract of approximately 133.246 acres located on the south side of the 3200 block of

Stag Road, and at the dead end in the 5000 block of Wadsworth Drive, being City Blocks 5835 and 6860 (hereinafter "the Property"), in the City of Dallas, Dallas County, Texas. Service of Process has already been had on Defendant James C. Currey.

III.

Flowerdale LLC is a Texas corporation and is, or was during relevant time periods, the owner of the Property. Service of process may be made upon Flowerdale LLC by service on its registered agent, CT Corporation System, 811 Dallas Avenue, Houston, Texas 77002.

IV.

The property in question is located in the County of Dallas, Texas. Approximately two-thirds of the property is located within a flood plain of Five Mile Creek, in an area defined under the Dallas City Code as "undesignated Flood Plain" (FP area).

V.

Section 51A-5.105 of the Dallas City Code, entitled "FILLING IN THE FLOODPLAIN," expressly mandates in (a)(1) that:

> A person shall not deposit or store fill, place a structure or excavate in a FP area until he has obtained from the Director of Public Works a fill permit allowing the property to be developed at a specified elevation in compliance with this section, and he obtains all required state and federal permits.

VI.

Defendant James C. Currey has deposited or has allowed to be deposited illegal fill material on the property without a permit. To date, at least five dump truck loads of fill dirt have been deposited and stored illegally without a permit. Such illegal fill creates an obstruction and blockage of the Five Mile Creek Flood Plain, posing an imminent threat to the safety and welfare of the surrounding community.

VII.

Defendant James C. Currey has been informed by representatives of the City of Dallas that such illegal fill constitutes a violation of the Dallas City Code and presents a safety hazard. Specifically, on March 28, 1994, an employee of the Dallas Public Works Department observed dump trucks filling in flood plain, and informed Defendant that such actions in filling the Flood Plain were illegal.

Again, on March 31, 1994, the same employee observed trucks filling in flood plain, and issued a citation to the individual who represented himself to be the owner of the property. Defendant has willfully and intentionally continued to violate the Dallas City Code, as described herein, to the present time.

VIII.

Section 7A-19 of the Dallas City Code entitled "duty to maintain premises free from litter" expressly mandates that:

> An owner, occupant, or person in control of private premises commits an offense if he places, deposits, or throws; permits to accumulate; or permits or causes to be placed, deposited, or thrown, any litter on the premises or in or on any gutter or parkway adjacent to the premises or

on one-half of that portion of an alley adjacent to the premises, unless the litter has been deposited in an authorized private receptacle for collection.

IX.

Section 18-10(a)(1) of the Dallas City Code entitled "REGULATING THE PROCESSING AND DISPOSAL OF SOLID WASTE MATERIALS" expressly mandates, in relevant part, that:

> A person commits an offense if he disposes of dry or wet solid waste or other waste materials inside the city, other than at a location and in a manner approved by the director of sanitation as complying with state and local law regulating solid waste processing and disposal.

X.

Section 18-12(b) of the Dallas City Code, entitled "REGULATING THE COLLECTION AND REMOVAL OF ILLEGALLY DUMPED SOLID WASTE MATERIALS ON PRIVATE PREMISES," expressly mandates, in relevant part, that:

> An owner, occupant, or person in control of private premises commits an offense if he places, or throws; permits to accumulate; or permits or causes to be placed, deposited, or thrown, solid waste material on those premises, unless the solid waste material has been deposited in an authorized private receptacle for collection.

XI.

Defendant James C. Currey has deposited, permitted to be deposited, and permitted to accumulate, litter on the premises owned and controlled by him, but not in an authorized

private receptacle for collection. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community. Defendant has also disposed of dry solid waste materials other than at a location and in a manner approved by the Director of Streets, Sanitation, and Code Enforcement. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community. Defendant has also deposited, permitted to be deposited, and permitted to accumulate, solid waste materials on the premises owned and controlled by Defendant. Such illegal acts create an imminent threat to the safety and welfare of the surrounding community.

XII.

Defendant James C. Currey has been informed by representatives of the City of Dallas that such illegal dumping constitutes a violation of the Dallas City Code and presents a safety hazard. Specifically, on July 22, 1994, an employee of the Dallas Department of Streets, Sanitation, and Code Enforcement observed tractor-trailers loaded with construction debris entering the premises. Other trucks loaded with debris for disposal attempted to enter the property for the purpose of dumping, but were warned that such dumping was illegal, causing such trucks to leave. Such activities have been observed on July 28, 1994, as well. Employees of the City of Dallas have informed Defendant that such dumping is illegal.

XIII.

On May 3, 1995, Defendant James C. Currey transferred the Property to Defendant Flowerdale LLC. Defendant James C. Currey is now and has been at all relevant times an owner of Flowerdale LLC. At the time of the transfer,

Defendant James C. Currey owned a controlling interest in Flowerdale LLC.

XIV.

Section 7A-19 and Section 18-12(b) of the Dallas City Code provide that an owner of property commits an offense by "permitting (waste) to accumulate" on property. Defendant Flowerdale LLC has permitted waste to accumulate on a continuous basis since it acquired the property. As James C. Currey had knowledge of the offenses in existence on the property upon transfer to Flowerdale LLC, and as James C. Currey has at all times either held a controlling interest in Flowerdale LLC or been active in the affairs of Flowerdale LLC, knowledge of the violations is imputed to the corporate entity Flowerdale LLC.

XV.

Section 211.012 of the Local Government Code allows a municipality to obtain an injunction against violations of a zoning ordinance without proving that Defendant's use of the property in question constitutes a threat to the public health, safety or welfare.

XVI.

Section 54.016 of the Texas Local Government Code allows a municipality to obtain an injunction against violations of an ordinance upon showing of substantial danger or injury or an adverse health impact to any person or to the property of any person other than the Defendant. It is not necessary for the municipality to prove no adequate remedy at law exists. Nor is it necessary for the municipality to show that a criminal prosecution has occurred or has been attempted. Chapter 54 applies because the Flood Plain

ordinance involved relates to zoning that provides for the use of land.

XVII.

Pursuant to Section 54.013 of the Local Government Code, venue for an action under Chapter 54 is in the county in which the municipality is located. Accordingly, venue for this matter properly lies in Dallas County.

XVIII.

Unless this court immediately enjoins the activity of the Defendant, Plaintiff and its citizens will suffer irreparable injury. Through the actions of Defendant, there has been a blockage and obstruction of the Five Mile Creek Flood Plain. There has also been an accumulation of litter, debris, and other solid waste on the tract in question. Defendant is continuing to violate the Dallas City Code in a manner which jeopardizes the health and safety of the persons in the community as well as posing a serious risk of substantial property damage and destruction. Defendant is the lawful owner of the property and, although aware of the illegal activities, has been unwilling to correct or remedy the situation.

XIX.

Defendant's willful and continuing violation of the ordinances of the City of Dallas has left Plaintiff without an adequate remedy at law. Unless this court immediately enjoins the violations of the Defendant, there exists an immediate danger that the health, safety and property of the citizens of Dallas will be permanently damaged.

XX.

Plaintiff prays that upon notice and hearing, this Honorable Court issue a temporary injunction ordering Defendant to remove all unauthorized and illegal fill material deposited and stored on his property along the Five Mile Creek Flood Plain. Plaintiff further prays that upon final trial on the merits, this Honorable Court issue a permanent injunction enjoining Defendant from illegally depositing and storing fill material on the property, and that this court order Defendant to remove all unauthorized and illegal fill deposited and stored on the property before the expiration of ninety (90) days from the entry of final judgment. In the alternative, Plaintiff prays that this Honorable Court permit Plaintiff to remove all unauthorized and illegal fill material from the property at the sole cost and expense of the Defendant, should Defendant not do so before the expiration of ninety (90)days, and that this court issue appropriate orders for the collection of said costs and expenses by Plaintiff from Defendant.

XXI.

Section 54.017 of the Local Government Code permits a municipality to recover a civil penalty in an amount not to exceed $1,000 per day for a violation of a City of Dallas ordinance. Pursuant to this authority, the City of Dallas requests the court impose a civil penalty for each day of the continuous violations of the Dallas City Code since the date Defendant received notice of the violations.

WHEREFORE, PREMISES CONSIDERED, the City of Dallas prays for the following relief:

1. That a temporary restraining order be issued immediately, enjoining Defendant from storing illegal fill material on the property, within the floodplain, without a permit,

and enjoining Defendant from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property;

2. That a temporary injunction be issued enjoining Defendant from depositing and storing illegal fill material on the property without a permit, enjoining Defendant from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property, ordering the removal of all unauthorized and illegal fill material now stored on the property, and ordering the removal of all illegally deposited solid waste material now deposited on the property;

3. That a permanent injunction be issued enjoining Defendants from depositing and storing illegal fill material on the property without a permit, enjoining Defendants from depositing, permitting to be deposited, or permitting to accumulate solid waste material on the property, ordering the removal of all unauthorized and illegal fill material now stored on the property, and ordering the removal of all illegally deposited solid waste material now deposited on the property before the expiration of ninety (90) days from the entry of final judgment in this cause;

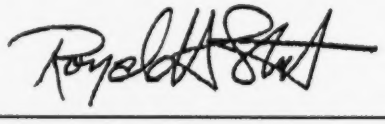
4. In the alternative, should Defendants fail to remove all unauthorized and illegal fill material and illegal solid waste material before the expiration of said ninety (90) days, that Plaintiff, City of Dallas, be allowed to remove all unauthorized and illegal fill material and solid waste material deposited and stored on the property at the sole cost and expense of Defendants, and appropriate orders for collection of said costs and expenses by Plaintiff from Defendants to be issued concurrently with the permanent injunction;

5. That the court impose a civil penalty against Defendant James C. Currey and Defendant Flowerdale LLC for each day of continuous violations of the Dallas City Code since the date Defendant received notice of the violations; and

6. That Plaintiff recover its costs incurred including attorney's fees, and for such other and further relief, general or special, at law or in equity, to which this Plaintiff may show itself justly entitled.

Respectively submitted,

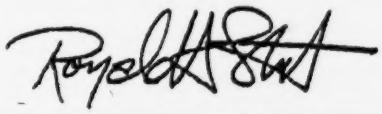
OFFICE OF THE CITY
ATTORNEY CITY OF
DALLAS, TEXAS
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510
Telecopier – (214) 670-3515

BY 

RONALD D. STUTES
Assistant City Attorney
State Bar of Texas
No. 19452600

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by certified mail, return receipt requested on Defendant James C. Currey and Intervenor Lamar Nealy on October 8, 1997.



RONALD D. STUTES

James C. Currey, Pro Se
P.O. Box 7308
Dallas, Texas 75209

Lamar Nealy, Pro Se
3123 Bertrand
Dallas, Texas 75215

CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, Defendant and Counter-Plaintiff, AND FLOWERDALE L.L.C., Defendant, vs. LAMAR NEALY, Intervenor. JAMES C. CURREY, Third-Party Plaintiff, vs. ELVIN PETERSON AND PATSY QUESTED, Third-Party Defendants.	NO. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

ORIGINAL ANSWER OF FLOWERDALE, L.L.C.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Flowerdale L.L.C. ("Flowerdale"), one of the Defendants in this action, and files that its Original Answer and would respectfully show the Court as follows:

GENERAL DENIAL

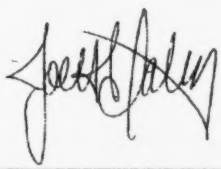
Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant Flowerdale files this General Denial. Flowerdale

denies each and every, all and singular, the allegations made by Plaintiff in its petition and demands strict proof thereof.

WHEREOF, PREMISES CONSIDERED, Flowerdale respectfully prays that Plaintiff takes nothing by this suit, Flowerdale recover its costs, and Flowerdale have such other and further relief, both general and special, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)



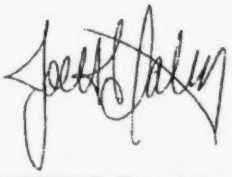
Joe H. Staley, Jr.
State Bar No. 19017000
Sharon R. Fancher
State Bar No. 00796529
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
Telephone: (214) 740-8000
Facsimile: (214) 740-8800

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via certified mail, return receipt requested, to counsel for Plaintiff and Third-Party Defendants and to Intervenor on this 19 day of November, 1997.

Mr. Ronald D. Stutes
Office of the City Attorney
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201

Mr. Lamar Nealy
3123 Bertrand
Dallas, Texas 75215



Joe H. Staley, Jr.

CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, Defendant and Counter-Plaintiff, AND FLOWERDALE L.L.C., Defendant, vs. LAMAR NEALY, Intervenor. JAMES C. CURREY, Third-Party Plaintiff, vs. ELVIN PETERSON and PATSY QUESTED, Third-Party Defendants.	NO. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

ORIGINAL ANSWER OF FLOWERDALE L.L.C.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Flowerdale L.L.C. ("Flowerdale"), one of the Defendants in this action, and files this its Original Answer and would respectfully show the Court as follows:

GENERAL DENIAL

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denies each and every, all and singular, the allegations made by Plaintiff in its petition and demands strict proof thereof.

WHEREFORE, PREMISES CONSIDERED, Flowerdale respectfully prays that Plaintiff takes nothing by this suit, Flowerdale recover its costs, and Flowerdale have such other and further relief, both general and special, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)

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Dallas, Texas 75201-6776
Telephone: (214) 740-8000
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CERTIFICATE OF SERVICE

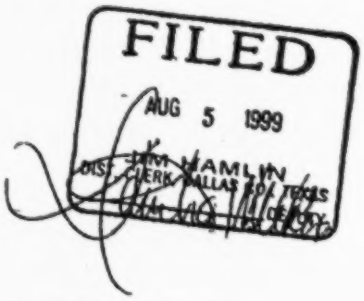
I hereby certify that a true and correct copy of the foregoing has been sent via certified mail, return receipt requested, to counsel for Plaintiff and Third-Party Defendants and to Intervenor on this 19 day of November, 1997.

Mr. Ronald D. Stutes
Office of the City Attorney
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201

Mr. Lamar Nealy
3123 Bertrand
Dallas, Texas 75215

Joe H. Staley, Jr.

Appendix J

CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, Defendant and Counter-Plaintiff, AND FLOWERDALE L.L.C., Defendant, vs.- LAMER NEALY, Intervenor. JAMES C. CURREY, Third-Party Plaintiff, vs. ELVIN PETERSON and PATSY QUESTED, Third-Party Defendants.	 NO. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

FLOWERDALE L.L.C.'S PETITION IN INTERVENTION

Intervenor, Flowerdale L.L.C. ("Flowerdale"), files this Petition in Intervention as a party counter-plaintiff.

A. Parties

1. Intervenor is a Texas limited liability company.

2. Counter-Plaintiff James C. Currey ("Currey") is an individual residing in Dallas County, Texas.

3. Counter-Defendant the City of Dallas ("City") is a municipal corporation.

B. Facts

4. On May 12, 1994, the City, as Plaintiff, sued Currey, as Defendant, for filling of a flood plain, dumping, blocking of a flood plain, and other related causes of action. Currey answered asserting a general denial and other affirmative defenses to said claims.

5. On August 10, 1994, Currey filed a counterclaim alleging the taking by the City of certain property (the "Subject Property") involved in the original lawsuit and described hereafter through inverse condemnation. At the time, Currey was the owner of the Subject Property.

6. On May 3, 1995, Currey transferred ownership of the Subject Property to Flowerdale. Currey, a principal owner of Flowerdale, by agreement has continued to act for the owners of the Subject Property on behalf of himself and Flowerdale as their respective interests appear in regard to this lawsuit.

7. Flowerdale subsequently was added to this lawsuit by the City as a party defendant regarding the City's original claims against Currey. As such, the City was well aware of Flowerdale's existence and its relationship to the Subject Property. The City never filed a verified plea challenging Currey's capacity to assert the counterclaim.

8. Prior to the trial of this action, Currey and Flowerdale filed their Motion to Establish Date of Taking. After the case was called to trial, the Court heard evidence and granted this Motion. Accordingly, and to conform the pleadings and to the evidence at trial, Flowerdale seeks formally to intervene as a party counter-plaintiff in the inverse condemnation counterclaim originally filed by Currey.

C. Right to Intervene

9. A party may intervene as a counter-plaintiff if it is asserting a claim which arises from the same transaction or occurrence and has a common question of law or fact with the original counterclaim. T.R.C.P. 40; *see Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 199); *E & B Carpet Mills v. State*, 776 S.W.2d 286, 290 (Tex. App. — Austin 1989, writ dism'd).

10. The Subject Property was conveyed by Currey to Intervenor on May 3, 1995. At all material times thereafter, Currey, who is a principal and owner of Intervenor, by agreement has acted as Intervenor's agent and representative regarding the Subject Property and this lawsuit.

11. It has now been determined by this Court that the Subject Property was taken as of March 7, 1996, after its acquisition by Intervenor. Intervenor, therefore, should receive such compensation as may be paid for the taking of the Subject Property as the real party at interest on the date of taking. This Petition in Intervention is filed herein to indicate the desire of Intervenor to be added as a Counter-Plaintiff and to indicates its agreement to being named as a party counter-plaintiff.

12. The intervention is timely and not prejudicial to Plaintiff. Intervenor has been a party-defendant in this lawsuit, and therefore known to Plaintiff, since long before trial commenced in March 1999. Plaintiff first objected to Intervenor's presence as a counter-plaintiff at the beginning of trial in March 1999, which objection the Court overruled. Intervenor's prior lack of appearance at trial as a specified counter-plaintiff does not require Defendant to present or to rebut any additional evidence, or to otherwise alter its defense of the Counterclaim.

D. Intervenor's Causes of Action

13. Intervenor asserts a claim against the City for inverse condemnation of the Subject Property, which property was owned on the date of taking by Intervenor and identified as 100 acres, more or less, out of 142.98 acres located in City Blocks 6860 and 5836 within the City of Dallas, Dallas County, Texas. The Subject Property is more fully described in Plaintiff's Exhibits 1, 2 and 5 filed heretofore in this cause and consists of that property designated as (FP) on the City of Dallas flood plain maps and owned by Intervenor on March 7, 1996, as above referenced. This claim is asserted under Art. I, § 17, of the Texas Constitution, and Art. V of the United States Constitution. The City unlawfully took the Subject Property on March 7, 1996, from Intervenor when, after initially designating the Subject Property as flood plain based solely on FEMA's determination, the City intentionally, arbitrarily, and unreasonably refused to remove the City's flood plain designation from the Subject Property on the City's zoning maps, or to justify by any proper means the continued classification of the Subject Property as flood plain, or to cease the enforcement of the burdening encumbrances upon the landowner uses of the Subject Property which are encompassed in a flood plain designation, or to obey orders of this Court related thereto, even after being notified twice by FEMA in March 1996 that the Subject Property was indeed no longer in the flood plain and therefore to amend its maps to indicate such. The continued unlawful promulgation of the flood plain designation and improper enforcement of the use limitations attendant thereto by the City destroyed whatever economic viability the Subject Property otherwise would have had, and rendered functionally useless Flowerdale's property interests in the Subject Property.

14. For the above-described taking, Flowerdale seeks to recover from the City the market value of the Subject Property as of March 7, 1996, together with damages, if any, to the remainder, plus all appropriate interest thereon until paid in full as mandated by law. *Westgate, Ltd. v. State*, 843 S.W.2d 448 (Tex. 1992).

PRAYER

For these reasons Intervenor asks that it be added as a party counter-plaintiff and recover judgment against the City of Dallas for the following:

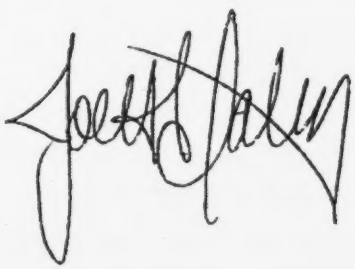
A. Fair market value of the Subject Property acquired by the City by inverse condemnation including damages to the remainder thereof.

B. Interest from the date of taking on all amounts awarded including post-judgment interest as allowed by law.

C. Costs of suit and all other relief which the Court deems appropriate.

Respectfully submitted,

LAW OFFICES OF JOE H. STALEY, JR.
A PROFESSIONAL CORPORATION



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(214) 739-3700
FAX (214) 739-1919
ATTORNEYS FOR FLOWERDALE, L.L.C. AND
JAMES C. CURREY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent to counsel for Plaintiff via first class mail, and first class mail to Intervenor Lamer Nealy, pro se, on this 5th day of August, 1999.

Mr. Ronald D. Stutes
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1500 Marilla Street
Dallas, Texas 75201

Mr. Lamer Nealy
3123 Bertrand
Dallas, Texas 75215

Joe H. Staley, Jr.

Appendix K

CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, and FLOWERDALE L.L.C., Defendants and Counter-Plaintiffs	NO. 94-07642-K IN THE DISTRICT COURT 192nd DISTRICT COURT DALLAS COUNTY, TEXAS

FINAL JUDGMENT

This case began as an action by the Plaintiff and Counter-Defendant City of Dallas against a landowner, Defendant and Counter-Plaintiff James C. Currey, for violations of various city ordinances pertaining to allegedly illegal activities in connection with real property owned by Currey located within the City of Dallas. Currey subsequently counterclaimed for "inverse condemnation" by the City of Dallas, essentially alleging that the City of Dallas had "taken" or otherwise damaged his property. Currey thereafter transferred the property to Defendant and Counter-Plaintiff Flowerdale, L.L.C. The City of Dallas subsequently amended its pleadings to assert against Flowerdale the same claims asserted against Currey. Currey did not at that time formally amend his counterclaim to include Flowerdale as a Counter-Plaintiff, nor did Flowerdale at that time formally intervene as Counter-Plaintiff. However, the parties, including the City of Dallas, thereafter filed pleadings and otherwise appeared before the Court as though Flowerdale was a defendant and counter-plaintiff party in the case, and the Court treated Flowerdale accordingly.

On June 23, 1998, the Court entered an Order sanctioning the City of Dallas for various conduct in connection with pre-trial activities in the lawsuit. A copy of the Sanction Order is attached hereto as "A" and incorporated and adopted herein by reference. Subsequently, and in response to a partial summary judgment motion filed by Defendants and Counter-Plaintiffs on March 17, 1999, the Court granted partial summary judgment in favor of Defendants and Counter-Plaintiffs, dismissing all of the City of Dallas' claims against them. A copy of the Partial Judgment is attached hereto as "B" and incorporated and adopted herein by reference. As a result of this Order, the only claims remaining for trial were the "inverse condemnation" counterclaims of Defendants and Counter-Plaintiffs.

On March 22, 1999, the Court called the case for trial. The City of Dallas, James C. Currey and Flowerdale, acting through their respective counsel of record, appeared and announced ready for trial. The Court determined that it must first adjudicate, without a jury, the issue of whether the City of Dallas was liable for the alleged "taking" of the subject property. Accordingly, the Court thereafter heard evidence and arguments pertaining to the liability issue.

On August 26, 1999, the Court entered an Order in favor of landowners, finding, in essence, that a compensable "taking" of the property had occurred on March 7, 1996. A copy of the Taking Order is attached hereto as "C" and incorporated and adopted herein by reference. On September 23, 1999, the Court entered an Order clarifying that Flowerdale was properly a party Counter-Plaintiff. A copy of the Clarifying Order is attached hereto as "D" and incorporated and adopted herein by reference.

On May 22, 2000, the Court called for trial the remaining issues pertaining to damages. At that time, and prior to the commencement of the damages trial, the Court heard and

denied the City of Dallas' recently-filed Motion to Reopen Evidence. The Court then impaneled and swore the jury, which heard the evidence presented by the witnesses and the arguments of counsel. In response to and in accordance with questions and instructions agreed to in form by all parties, the jury made findings regarding the value of the "taken" property and any damages to the remainder property. A copy of the jury charge and findings is attached hereto as "E" and incorporated and adopted herein by reference.

The City of Dallas thereafter moved for judgment notwithstanding the verdict, which motion was denied. To the extent not already found by the Court and addressed in previous rulings and orders of the Court, the Court finds that James C. Currey and Flowerdale, L.L.C. are proper parties to the counterclaims on file with the Court, the Court has both subject matter and personal jurisdiction over all the parties, the counterclaims state a cause of action or causes of action against the City of Dallas sufficient to support the findings and conclusions made by the Court in the Taking Order and Clarifying Order and the findings made by the jury, requisite issues were tried by consent, and the aforementioned findings and conclusions of the Court and the jury are supported by sufficient competent evidence and are in accordance with the laws of the State of Texas. As such, Counter-Plaintiffs' motion for final judgment was granted, and the Court enters this Final Judgment disposing of all claims and issues.

IT IS THEREFORE ORDERED by the Court that all claims asserted or which could have been asserted by the City of Dallas against James C. Currey and Flowerdale, L.L.C. are DENIED and dismissed with prejudice, and that the City of Dallas takes nothing.

IT IS FURTHER ORDERED by the Court that the counterclaims of James C. Currey and Flowerdale, L.L.C.

against the City of Dallas are GRANTED, and that James C. Currey and Flowerdale, L.L.C. have and recover against the City of Dallas the sum of $4,099,793.00, with interest thereon at the rate of 10% from March 7, 1996, until paid, as provided by law.

IT IS FURTHER ORDERED by the Court that all costs of court expended or incurred in this cause are adjudged against the City of Dallas.

All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

All other relief not expressly granted in this judgment is denied.

SIGNED this 6 day of June, 2000.

Merrill Hartman

The Honorable Merrill Hartman
Judge Presiding

CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, Defendant and Counter-Plaintiff, AND FLOWERDALE L.L.C., Defendant, vs. LAMAR NEALY, Intervenor. JAMES C. CURREY, Third-Party Plaintiff, vs. ELVIN PETERSON and PATSY QUESTED, Third-Party Defendants.	NO. 94-07642-K IN THE DISTRICT COURT 192nd JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

ORDER GRANTING FLOWERDALE, L.L.C.'S MOTION FOR SANCTIONS

This matter having come on for hearing on June 3, 1998, and the court having examined the moving papers, considered the evidence, and heard the argument of counsel, orders as follows:

IT IS HEREBY ORDERED that for purposes of this lawsuit, it is established that no property of Flowerdale, L.L.C. or James C. Currey which is the subject of this cause

of action is to be considered within, nor having been designated as within, a flood plain;

IT IS FURTHER ORDERED that the City of Dallas is prohibited from introducing evidence of any nature that the subject property of this cause of action or any part thereof owned by Flowerdale, L.L.C. and/or previously owned by James C. Currey is or was in any flood plain, whether designated by FEMA, the city of Dallas or otherwise;

IT IS FURTHER ORDERED that the City of Dallas's pleadings insofar as they allege that Flowerdale and/ or Mr. Currey violated laws including ordinances governing activities that may or may not take place or have taken place within a flood plain area are stricken;

IT IS FURTHER ORDERED that the City of Dallas shall pay all costs of court relating to this Motion, for the preparation, filing, and resolution hereof.

June 23, 1998

DATE

Ted M Allen

JUDGE PRESIDING
ILLEGIBLE Court of Appeals, sitting
for Judge 192nd Judicial District Court,
Dallas, Texas

CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, Defendant and Counter-Plaintiff, AND FLOWERDALE L.L.C., Defendant, vs. LAMER NEALY, Intervenor. JAMES C. CURREY, Third-Party Plaintiff, vs. ELVIN PETERSON and PATSY QUESTED, Third-Party Defendants.	NO. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

PARTIAL JUDGMENT

On the 27th day of January, 1999, came on to be considered James C. Currey and Flowerdale, L.L.C.'s Motion for Partial Summary Judgment Against the City of Dallas in the above styled and numbered cause. The parties appeared by their respective attorneys of record and announced ready. After considering the pleadings, lack of proof raised opposing the motion, the argument of counsel and the authorities cited by counsel, the Court finds that the motion for summary judgment has been made in the proper form, that there

has been ample time for discovery, that there is no evidence of one or more essential elements of each claim upon which Plaintiff would have the burden of proof at trial, that the Plaintiff has not raised a genuine issue of material fact by competent summary judgment evidence pertaining to each claim; that the service of the motion and notification of the hearing thereon has been made as required by law; that this Court has jurisdiction over the subject matter; that there is no genuine issue as to any material fact with respect to the issues set out in Defendants' motion; and that summary judgment should be rendered for the Defendant, who is entitled to judgment thereon as a matter of law in all claims of Plaintiff.

IT IS ACCORDINGLY HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The claims of the City of Dallas raised in its pleadings against James C. Currey and Flowerdale, L.L.C. and each of said claims are dismissed with prejudice to rebringing same or any of them.

2. All relief in law and equity requested by the City of Dallas from James C. Currey and Flowerdale, L.L.C., raised by its pleadings in this cause be and same are hereby denied.

3. The entry of this judgment is intended as a final resolution of all issues raised by this MOTION FOR PARTIAL SUMMARY JUDGMENT.

IT IS SO ORDERED.

SIGNED this 17 day of March, 1999.

Judge Presiding

CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, Defendant and Counter-Plaintiff, AND FLOWERDALE, L.L.C., Defendant, vs. LAMER NEALY, Intervenor. JAMES C. CURREY, Third-Party Plaintiff, vs. ELVIN PETERSON and PATSY QUESTED, Third-Party Defendants.	NO. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

ORDER

On the 23rd day of March, 1999, the trial of the counter-claim originally filed by James C. Currey ("Currey") in the above-styled cause was begun. Currey, at the time of trial, represented both himself and Flowerdale L.L.C. as its agent (references to "Currey" in contexts herein prior to May 3, 1995, are to him individually and thereafter are to him as agent for Flowerdale L.L.C.; references to "Landowner" are to Currey individually and as agent for Flowerdale L.L.C. and to Flowerdale L.L.C. as their respective interests appear

on the date of such reference). Defendants' Motion to Establish Date of Taking (the "Motion") was the first matter to be considered by the Court. All parties appeared by their respective attorneys of record and announced ready for trial. After considering the Motion, the proof supporting and opposing the Motion, the briefs and authorities cited by counsel, and the evidence presented, the Court finds the following:

1. that the Motion has been made in the proper form and is supported by competent evidence;

2. that service of Counterclaim and the Motion and notification of the trial have been made as required by law and that trial hereof commenced on March 23, 1999;

3. that this Court has jurisdiction over the subject matter and the parties;

4. that the matters contained in the Motion are ripe for determination;

5. that the property that is the subject of this Counterclaim and Motion (the "Subject Property") is part of a tract of land which at the time of filing this Counterclaim in 1994 was wholly owned by Currey, and which tract of land on May 3, 1995, was conveyed by deed to his successor, Flowerdale L.L.C., for which Currey thereafter continued to act as agent in this litigation concerning the Subject Property;

6. that the Subject Property is located at 3200 Stag Road, Dallas, Dallas County, Texas, being that property in Dallas City Block 6860 and designated as flood pain (FP) on the City of Dallas Zoning Maps and on the Flood Insurance Rate Map ("FIRM") of the Federal Emergency Management Agency ("FEMA") Community-Panel No. 480171 0175 D, City of Dallas, Texas Panel 175 of 235, dated July 2, 1991, and containing 100 acres of land, more

or less as delineated in Plaintiff's Exhibits 1, 2, and 5, previously filed herein;

7. that the City's designation of the Subject Property as FP (Flood Plain) and its subsequent maintaining of the FP designation thereon, was based on FEMA's determination that the Subject Property was in the 100-year flood plain;

8. that Currey, believing the Subject Property to have been improperly included in the 100-year flood plain, demanded in 1994 that the City discontinue its designation thereon;

9. that the City, did not respond to Currey's demand; instead, it refused to remove the FP designation or to initiate studies/surveys to justify an FP designation even after being initially ordered by this Court to stake and to survey the Subject Property;

10. that Currey thereafter applied to FEMA for removal of the Subject Property from the designated flood plain (FP);

11. that FEMA, in response to Currey's application, requested, and Currey thereafter supplied, the necessary empirical evidence to establish under FEMA criteria that the Subject Property was not in the flood plain;

12. that a Letter of Map Amendment ("LOMA") which is still in effect was thereupon issued by FEMA on March 7, 1996, declaring that the Subject Property is not in the 100-year flood plain;

13. that FEMA contemporaneously notified the City of the LOMA and directed the City to append the LOMA to the City's flood plain maps;

14. that the City, in response to FEMA's directive, intentionally failed and refused at that time to remove the

FP designation from the Subject Property and to append the LOMA to the City's flood plain maps; and instead, it telephonically and by letter of June 12, 1996, questioned FEMA as to whether the issuance of the LOMA was justified;

15. that FEMA, in response to the City's inquiries, specifically informed the City by letter dated July 16, 1996, that the prior LOMA was justified based on empirical evidence submitted by Currey;

16. that the City did not reveal to Currey its inquiries by telephone or the July 16, 1996 LOMA response letter until produced pursuant to discovery in this Counterclaim some two years hence;

17. that the City, after receiving the July 16, 1996 reaffirmation from FEMA, again intentionally refused to append the LOMA to the City's flood plain maps and to remove the FP designation from the Subject Property, continued to disregard orders of this Court, and failed to initiate any study/survey independently to determine whether the Subject Property was in the flood plain or whether maintaining the FP designation was still justified;

18. that the City, by Orders dated August 23, 1994, and May 5, 1995, agreed to and was required by this Court, and on March 23, 1998, was unilaterally ordered by this Court, to perform surveys of and to stake the flood plain on the Subject Property, which surveying and staking the City failed and refused to perform;

19. that in 1997, Currey, having failed to get the City either to remove the FP designation or to justify its continued enforcement thereof, made reasonable efforts to obtain fill permits for the Subject Property, which permits were denied by the City;

20. that Currey, by his aforementioned conduct, took all reasonable steps necessary to remove the City's FP designa-

tion from the Subject Property, and thus exhausted his administrative remedies;

21. that the City's decision to retain the FP designation on the Subject Property, despite FEMA's determination and without further justification for its existence, was knowing, intentional and final;

22. that the existence of the FP designation on the Subject Property has had a severe and detrimental impact on the permitted uses of, and correspondingly on the market value of, the Subject Property, and effectively denies the Landowner all economically viable use of the Subject Property;

23. that the City has intentionally, unreasonably and arbitrarily interfered with the Landowner's right to use and enjoy the Subject Property, and has intentionally, unreasonably, and arbitrarily denied the Landowner all economically viable use of the Subject Property;

24. that the City by its actions has treated the Landowner and his representatives differently from other landowners similarly situated without any reasonable basis for doing so;

25. that acts of the City concerning the Subject Property have been irrational and constitute arbitrary and unreasonable activity considering the existing and permitted uses of property comparable to the Subject Property;

26. that there has been a significant economic impact on the Subject Property to the degree that actions by the City have interfered with distinct investment-backed expectations of the Landowner;

27. that the City, by its aforementioned conduct, is deemed to have appropriated the Subject Property for its own use without compensation to the owner of the Subject

Property, effective March 7, 1996, so as to constitute a "taking" of the Subject Property under Article I, § 17 of the Texas Constitution and Article V of the Bill of Rights of the United States Constitution; and

28. that the owner of the Subject Property has been damaged and should recover monetary damages from the City which result from the taking in an amount equal to the market value of the Subject Property on March 7, 1996, damages accruing to any remainder, and interest thereon from the date of taking.

WHEREFORE, it is accordingly hereby ORDERED as follows:

1. That Defendants' Motion to Establish Date of Taking is hereby granted.

2. That the approximately 100 acres of land located within the City of Dallas, Texas, in Dallas City Block 6860, belonging to Landowner, presently designated as FP by the City of Dallas on its official zoning maps and delineated on Plaintiff's Exhibits 1, 2, and 5 (to be more definitively described in a final judgement) has been permanently taken from Landowner by the City as of March 7, 1996, for public use without compensation by the City or consent of the Landowner.

3. That the City and Landowner will proceed with trial in this matter to determine the fair market value of the Subject Property and damages, if any, to the remainder as of March 7, 1996.

ORDER — Page 6

4. That the entry of this Order intended as a final resolution of all issues concerning the establishment of a taking of the Subject Property by inverse condemnation by the City and the date of said taking, leaving the only issues

to be finally determined to be those of just compensation due to the Landowner for the permanent taking of the property and damages to its remainder, if any.

5. That the trial of the counterclaim herein shall continue forthwith to determine the just compensation due Landowner from the City.

DONE AND ORDERED this 26 day of August, 1999.

Merrill Hartman

MERRILL HARTMAN
JUDGE, 192ND DISTRICT COURT

Copies to:

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CITY OF DALLAS, Plaintiff and Counter-Defendant, vs. JAMES C. CURREY, Defendant and Counter-Plaintiff, AND FLOWERDALE L.L.C., Defendant, vs. LAMER NEALY, Intervenor. JAMES C. CURREY, Third-Party Plaintiff, vs. ELVIN PETERSON and PATSY QUESTED, Third-Party Defendants.	NO. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

ORDER

On August 4, 1999, Defendant James C. Currey and Flowerdale LLC filed with the Court certain motions and a proposed Order pertaining to the "taking" of the subject property by the City of Dallas (the "City"). The City thereafter filed objections to those motions and to the proposed Order. On August 26, 1999, the Court overruled the City's objections and signed and entered the proposed Order ("the August 26th Order"). In so doing, by the terms of the August 26th Order and the entry thereof, the Court

granted Defendants' respective pending motions for leave to add Flowerdale LLC as counter-plaintiff and to intervene in the inverse condemnation counterclaim which is the subject of the August 26th Order. To clarify the August 26th Order, it is

THEREFORE, Ordered that James Currey's Motion for Leave to Add Party Counter-Plaintiff and Flowerdale LLC's Petition in Intervention are granted; that Flowerdale LLC is formally added as a party-plaintiff to the pending inverse condemnation counterclaim to the extent it isn't already a party to that claim; and that all references to "Landowner" in paragraphs 1-5 on pp. 6-7 of the August 26th Order are understood to include Flowerdale LLC as owner of the subject property on the date of taking established therein by this Court.

SO ORDERED

DATED: September 23, 1999

Merrill Hartman

MERRILL HARTMAN, JUDGE
192ND DISTRICT COURT

CITY OF DALLAS Plaintiff/Cross-Defendant, VS. JAMES C. CURREY Defendant/Cross-Plaintiff FLOWERDALE, LLC, Defendant/Cross-Plaintiff/ Intervenor, VS. LAMAR NEALY, Intervenor.	Cause No. 94-07642-K IN THE DISTRICT COURT 192ND JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during you deliberations.

Do not let bias, prejudice or sympathy play any part in your deliberations.

In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have

been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations you will not consider or discuss anything that is not represented by the evidence in this case.

Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

You must not decide who you think should win, and then try to answer the question accordingly. Simply answer the question, and do not discuss nor concern yourselves with the effect of your answer.

You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties,

attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

You are instructed that the term "fair market value" is the price the property would bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying, taking into consideration all those uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.

"Preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. The weight and degree of credible evidence is not necessarily determined by the number of witnesses testifying as to any fact or opinion.

JURY QUESTION NO. 1

What do you find from the preponderance of the evidence was the fair market value of the land owned by Flowerdale LLC and taken by the City of Dallas on March 7, 1996?

Answer in dollars and cents.

ANSWER: $4,099,793.00

JURY QUESTION NO. 2

From a preponderance of the evidence, what do you find to be the damages, if any, to the remaining property of Flowerdale LLC?

You are instructed that the damages, if any, to the remainder are to be determined by considering the difference between the fair market value of the remainder immediately before and immediately after the taking on March 7, 1996, ?????.

Answer in dollars and cents, if any.

ANSWER: $ ____-0-____

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

Merrill Hartman

JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____

PRESIDING JUROR

(To be signed by those rendering the verdict if not unanimous.)

James W Sargent

Sheila L Gill

Sara R Fernandez

Judy A Tower

Lisa A Sabey

William B Higgins

Joan McCall

Glen A. Walker

Karl Renner

Cathy L Lassiter

Appendix L

NO. 05-00-01436-CV

CITY OF DALLAS

Appellant-Plaintiff/Cross-Defendant

v.

JAMES C. CURREY and FLOWERDALE, LLC

Appellees-Defendants/Cross-Plaintiffs

v.

LAMAR NEALY

Intervenor

APPELLANT'S MOTION TO DISMISS FEDERAL CLAIMS FOR LACK OF SUBJECT-MATTER JURISDICTION AND BRIEF

TO THE HONORABLE COURT OF APPEALS:

Pursuant to Rule 42.3 of the Texas Rules of Appellate Procedure, Defendant City of Dallas ("City") respectfully moves this Court to dismiss the federal law claims, if any, of Flowerdale LLC ("Flowerdale") and James Currey ("Currey") (collectively "Landowners") for want of subject-matter jurisdiction on the grounds and for the reasons as follows:

FACTS

1. When Currey filed his counterclaims in August 1994, he did not allege any claims of a taking under the United States Constitution. (CR 61-70.)

2. After the first trial on liability issues, the trial court found that the City "appropriated the Subject Property for its own use *without compensation* to the owner...so as to constitute a taking of the Subject Property under Article I,

Section 17 of the Texas Constitution and Article V of the Bill of Rights of the United States Constitution." (CR 350 [emphasis added].) The trial court then stated "the entry of this Order is intended as a final resolution of *all issues* concerning the establishment of a taking of the Subject Property by inverse condemnation by the City..., leaving the only issues to be finally determined to be those of *just compensation* due to the Landowner...." (CR 351 [emphasis added].)

3. When Flowerdale intervened after the liability trial, it asserted a claim for just compensation under the Fifth Amendment. (CR 373.)

4. After the second trial on damages issues, the trial court granted Landowners' counterclaims, awarded them damages, and denied "all other relief not expressly granted in this judgment." (CR 391-92.)

GROUNDS FOR MOTION

5. This Court does not have jurisdiction over Landowners' claims, if any, for a taking of property without just compensation under the Fifth Amendment (collectively "Landowners' federal claims") because these claims are not ripe for adjudication.[1]

6. Landowners have adequate remedies for their federal claims under Article I, Section 17 of the Texas Constitution.

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[1]The arguments in this motion are not redundant with the City's arguments concerning the ripeness of Landowners' claims in the Appellant's Brief and Reply Brief. In those briefs, the City asserts that all of Landowners' claims are not ripe because they never obtained a final decision of the type and intensity of development legally permitted on their property before filing suit. Here, the City argues that Landowners' federal claims are not ripe because they have not sought and been denied compensation using procedures provided by state law.

ARGUMENT

7. *Basis for motion.* Landowners' federal claims are not ripe. Ripeness is a matter of subject-matter jurisdiction. It concerns when a party may bring an action. It prevents courts from needlessly entangling themselves in abstract disagreements. Claims of a taking are not ripe for adjudication when adequate state remedies exist. If a state provides an adequate procedure for seeking just compensation, a property owner cannot claim a violation of the Just Compensation Clause until he has used the procedure and been denied just compensation. This motion requests the Court to determine that adequate state remedies exist for Landowners' federal claims. Should the Court make that determination, then Landowners' federal claims are not ripe for adjudication as they have not yet used those procedures and been denied just compensation. Landowners' federal claims accordingly do not present an actual case or controversy at this time. Thus, the Court should dismiss these claims for lack of subject-matter jurisdiction.

8. *The nature of subject-matter jurisdiction.* Subject-matter jurisdiction cannot be presumed and cannot be waived. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993); *see also Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 448-49 n.2 (Tex. 1996). Lack of subject-matter jurisdiction can be raised at any time by the parties, including for the first time on appeal. *Texas Ass'n of Business*, 852 S.W.2d at 445. Subject-matter jurisdiction cannot be ignored; in fact, the court has an obligation *sua sponte* to examine whether it has jurisdiction of the subject matter. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). Because of its fundamental nature, the court must determine whether it has subject-matter jurisdiction once the issue is raised. *McClennahan v. First Gibraltar Bank*, 791 S.W.2d 607,

608 (Tex. App. — Dallas 1990, no writ). Once subject-matter jurisdiction is challenged, the party asserting jurisdiction bears the burden of establishing that the court has subject-matter jurisdiction over the dispute. *City of El Paso v. Madero Development*, 803 S.W.2d 396, 400 (Tex. App. — El Paso 1991, writ denied); cf. Pace Corp. v. Jackson, 284 S.W.2d 340, 350 (Tex. 1955).

9. *The nature of ripeness.* Ripeness is an element of subject-matter jurisdiction. See *Patterson v. Planned Parenthood of Houston & Southeast Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998); Mayhew, 964 S.W.2d at 928. Ripeness is a question of law subject to de novo review. *Mayhew*, 964 S.W.2d at 928; *Tex. Ass'n of Business*, 852 S.W.2d at 444-45. Last year, the Supreme Court described how a court determines whether a case is ripe.

> Ripeness . . . emphasizes the need for a concrete injury for a justiciable claim to be presented . . . [R]ipeness examines *when* that action may be brought. Under the ripeness doctrine, we consider whether, *at the time a lawsuit is filed*, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.' Thus, the ripeness analysis focuses on whether the case involves 'uncertain or contingent future events that may not occur as anticipated or may not occur at all.' . . . A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass.

Waco I.S.D. v. Gibson, 22 S.W.3d 849, 851-52 (Tex, 2000) (quoting *Patterson*) (emphasis in original).

10. *The justifications for the ripeness doctrine.* The ripeness requirement emanates, in part, from Article II, Section 1 of the Texas Constitution, which provides for the

separation of powers. *Patterson*, 971 S.W.2d at 442-43. Under the separation of powers doctrine, courts are without jurisdiction to issue advisory opinions because such is the function of the executive department, not the judiciary. *Mayhew*, 964 S.W. at 928; *Texas Ass'n of Business*, 852 S.W.2d at 444. The ripeness doctrine conserves judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes. *Mayhew*, 964 S.W. at 928. Thus, the ripeness doctrine has both constitutional and prudential dimensions. *Id.*

11. *A claim of a taking without just compensation under the Fifth Amendment is not ripe when an adequate state remedy exists.* The U.S. and Texas Supreme Courts have held that a claim under the Just Compensation Clause is not ripe for adjudication until the plaintiff has sought and been denied compensation using state procedures. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 & n.8 (1997); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194-95, 200 (1985); *Mayhew*, 964 S.W.2d at 929 n.2.[2] In *Williamson County*, the plaintiff brought a Section 1983 claim alleging that a county planning commission had taken its property without just compensation or due process. The Court dismissed the claims on ripeness grounds, explaining

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[2]When analyzing whether claims are ripe under the other prong of *Williamson County*, the Texas Supreme Court has urged Texas courts to "look to the experience of the federal courts in determining the ripeness of constitutional challenges to land-use regulations." *Mayhew*, 964 S.W.2d at 928-29; *see also City of El Paso v. Madero Dev.*, 803 S.W.2d 396, 400 (Tex. App. — El Paso 1991, writ denied), *cert. denied*, 502 U.S. 1073 (1992) (relying heavily on federal case law); *Kolb*, 982 S.W.2d at 952-54 (relying on *Mayhew* and *Madero*). In fact, the Texas Supreme Court suggested that it may be "compelled" by federal supremacy to rely on federal substantive law when examining federal claims. *Mayhew*, 964 S.W.2d at 929 n.1.

that "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Id.* at 194 n.13 (emphasis in original).

In *Williamson County*, the Court reasoned that the Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking. The Court then determined that the property owner has no claim against the government for a taking if it has provided an adequate process for obtaining compensation. The Court thus held:

> [T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act....Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner *cannot claim a violation* of the Just Compensation Clause *until it has used the procedure and been denied just compensation.*

Williamson County, 473 U.S. at 195 (emphasis added). Quite simply, a plaintiff has no injury of which to complain under the United States Constitution until the state's action is "complete." *Williamson County*, 473 U.S. at 195.

The Supreme Court then found that Tennessee allowed property owners to bring an inverse condemnation action to obtain just compensation. *Id.* at 196. The Court therefore dismissed the takings and due process claims because they were not ripe for adjudication, holding "because [the plaintiff] has not...utilized the procedures Tennessee provides for

obtaining just compensation, [the plaintiff's] claim is not ripe." *Id.* at 186; *see also id.* at 194, 197.[3]

The *Williamson County* Court did not explain what it meant by "adequate" procedures. The Court did, however, note that the Tennessee state courts had interpreted a statute "to allow recovery through inverse condemnation where the 'taking' is effected by restrictive zoning laws or development regulations." *Williamson County*, 473 U.S. at 196. The Court therefore implied that had the state not allowed recovery in that situation, the "procedures would have been 'inadequate.'" *Samaad v. City of Dallas*, 940 F.2d 925, 933-34 (5th Cir. 1991). Since then, the Fifth Circuit has held that a state procedure is adequate "even though its law is unsettled whether the claimant would be entitled to compensation." *Rolf v. City of San Antonio*, 77 F.3d 823, 826-27 (5th Cir. 1996); *Samaad*, 940 F.2d at 934 (finding state compensation procedures inadequate only if they "*almost certainly* will not justly compensate the claimant" (emphasis in original)). To meet this burden, Landowners must do more than show that the state procedure is unsure and undeveloped; they must show either statutory or judicial rejection of such procedures.

Thus, until a plaintiff has sought and been denied just compensation under state law, there is no case or controversy. *See Unix Sys. Lab. v. Berkeley Software*, 832 F. Supp. 790, 806 (D. N.J. 1993). "'Where just compensation is available, a taking is not unconstitutional.'" *Id.* (quotation

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[3] The Court also rested its holding that the case was unripe on an additional independent ground: that the plaintiff had "not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations" that caused the claimed taking. *Williamson County*, 473 U.S. at 186. The City made its arguments concerning Landowners' failure to comply with that prong of *Williamson County* in its Appellant's Brief and Reply Brief.

omitted). "In sum, [a claim under the Fifth Amendment] is *premature.*" *Williamson County*, 473 U.S. at 200 (emphasis added).

12. *The state law remedy for just compensation is adequate.* Texas law provides an adequate procedure for obtaining just compensation. Article I, Section 17 of the Texas Constitution provides in part: "no person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation being made . . ." Texas courts have long held that this constitutional provision creates a common law cause of action for inverse condemnation if the government appropriates property without paying compensation. *See e.g., Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992); *Steele v. City of Houston*, 603 S.W. 2d. 786, 790 (Tex. 1980); *City of Abilene v. Downs*, 367 S.W.2d 153, 159 (Tex. 1963). As for recovery for a taking, it has been held that property owners have *greater* rights of recovery for takings under the Texas Constitution than the United States Constitution. *See Palacios Seafood, Inc. v. Piling, Inc.*, 888 F.2d 1509, 1513 (5th Cir. 1989). Thus, a claim of a taking without just compensation brought under the United States Constitution is not ripe for judicial review in Texas until the plaintiff has availed himself of the state procedures for seeking compensation and been denied. *See Simi Inv. Corp., Inc. v. Harris County, Tex.*, 236 F.3d 240, 247 (5th Cir. 2000); *John Corp. v. City of Houston*, 214 F.3d 573, 580-81 (5th Cir. 2000); *Hallco Tex., Inc. v. McMullen County, Tex.*, 934 F.Supp. 238, 240 (S.D. Tex. 1996), *aff'd*, 109 F.3d 768 (5th Cir. 1997); *Rolf*, 77 F.3d at 826; *Samaad*, 940 F.2d at 936; *Smith v. City of Brenham, Tex.*, 865 F.2d 662, 663-64 (5th Cir. 1989), *cert. denied*, 493 U.S. 813 (1989).

13. *Claims must be dismissed when the Court does not have jurisdiction.* Lack of subject-matter jurisdiction

will arrest a cause at any state of the proceedings. *Madero Development*, 803 S.W.2d at 400; *Southwestern Bell Telephone Co. v. City of Kountze*, 543 S.W.2d 871, 873 (Tex. Civ. App. — Beaumont 1976, no writ). Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Texas Ass'n of Business*, 852 S.W.2d at 443. If a court lacks subject-matter jurisdiction, it has no discretion but to dismiss the case. *Qwest Microwave, Inc. v. Bedard*, 756 S.W.2d 426, 440 (Tex. App. — Dallas 1988, orig. proceeding); *Attorney General of Tex. v. Sailer*, 871 S.W.2d 257, 258 (Tex. App. — Houston [14th Dist.] 1994, writ denied). In fact, if the court lacks subject-matter jurisdiction, any ruling other than dismissal is fundamental error. *Texas Employment Comm'n v. International Union of Elec., Radio & Mach. Workers*, 352 S.W.2d 252 (Tex. 1961); *Qwest*, 756 S.W.2d at 440. The U.S. Supreme Court agrees: " 'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' " *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). The Court concluded: "The requirement that jurisdiction be established as a threshold matter is 'inflexible and without exception.'" Steel Co., 523 U.S. at 94-95 (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379,382 (1884)).

14. *Conclusion.* Here, Flowerdale claims and Currey allegedly claims that the City took their property without just compensation in violation of the Fifth Amendment to the United States Constitution. An adequate remedy under Texas law exists, however, for Landowners' federal claims for just compensation. Landowners thus have not suffered a concrete injury under the Fifth Amendment because they have yet to be denied just compensation under state law.

Accordingly, this Court must dismiss the federal claims because they are not ripe for adjudication.

WHEREFORE, PREMISES CONSIDERED, the City prays that: (1) this motion be granted; (2) all Landowners' claims brought under the United States Constitution be dismissed for lack of subject-matter jurisdiction; and (3) it be awarded such other and further relief, general or special, at law or in equity, to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Counsel for movant has personally attempted to contact the counsel for respondent to resolve the matters presented as follows: I telephoned his office and left messages for him on May 22, 23, and 24, 2001, but he has not returned my

calls. Counsel for the movant has served by facsimile a copy of this motion to counsel for respondent. At least one attempt to contact the counsel for respondent followed the receipt by counsel for respondent of the proposed motion. Counsel for respondent has failed to respond or attempt to resolve the matters presented. Counsel for movant presumes the motion is opposed.

Certified to the 24th day of May, 2001.

/s/ CHRIS BOWERS
CHRISTOPHER D. BOWERS

CERTIFICATE OF MAILING AND SERVICE

I hereby certify that the original and two copies of the foregoing document was sent by hand-delivery on May 24, 2001, to Lisa Matz, Clerk, Fifth District Court of Appeals, George L. Allen, Sr. Courts Building, Second Floor, 600 Commerce Street, Dallas, Texas 75202-4658, and that a copy has been sent by first-class mail on May 24, 2001, to the following persons:

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